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# Northern Illinois University Law Review

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**THE 1970 ILLINOIS CONSTITUTION IN REVIEW:  
A SYMPOSIUM ON ISSUES FOR CHANGE**

**CONTRIBUTIONS BY:**

*Leonard P. Strickman*

*Samuel W. Witwer*

*Ann Lousin*

*Stanley Mosk*

*Nancy Ford*

*B. Douglas Anderson*

*James Banovetz & Thomas Kelty*


*Jack R. Van Der Slik*

*Pinky Wassenberg*

*J. Fred Giertz & David L. Chicoine*

*Jeffrey A. Parness and Bruce Elliot Keller*

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# Northern Illinois University Law Review



## **The 1970 Illinois Constitution in Review: A Symposium on Issues for Change**

The Board of Editors of the Northern Illinois University Law Review would like to extend its sincerest thanks and gratitude to the Illinois Bar Foundation for their interest in this project and their generous grant which helped finance this Symposium

Northern Illinois University

Law Review

Volume 8	Summer 1988	Number 3
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ARTICLES

Foreword .....	565
Leonard P. Strickman	
Introduction .....	567
Samuel W. Witwer	
The 1970 Illinois Constitution: Has It Made A Difference? ..	571
Ann Lousin	

*This Article provides an extensive overview of the 1970 Illinois Constitution dividing the document into ten topic areas. The Article explores the history, philosophy and politics which shaped the document, identifies most, if not all, of the important issues concerning the current Illinois Constitution, and analyzes its effectiveness in the years since its adoption in 1970.*

The Power of State Constitutions in Protecting Individual Rights .....	651
Stanley Mosk	

*Adapted from remarks presented at the annual joint meeting of the Illinois State Bar Association and the Illinois Judges Association in October, 1987, this Article emphasizes the important role state constitutions can play as an adjunct to the United States Constitution in protecting individual rights.*

From Judicial Election to Merit Selection: A Time for Change in Illinois .....	665
Nancy Ford	

*This Article focuses on one of the paramount issues surrounding the 1970 Constitution. Illinois' current method of selecting judges by election is compared to selection by appointment. The Article analyzes the quality, accountability and independence of judges under both methods. While finding relatively little difference in quality or accountability under either system, the article concludes that greater judicial independence calls for a change to some form of appointive merit selection.*



342,77302  
N622  
Ill. Historical  
Survey

Illinois Home Rule and Taxation: A New Approach to Local  
Government Enabling Authority ..... 709  
James Banovetz and Thomas Kelty

*This Article examines and assesses the use of the home rule powers which were granted to local governments by the 1970 Constitution. Focusing primarily on the power of taxation, the Article notes that the use of the home rule powers has been restrained and generally successful. The Article points to narrow judicial reactions, however, which may conflict with the apparent intent of the constitution's drafters to grant broad authority to local government under the home rule powers.*

The Education Article of the 1970 Constitution: Selected Policy  
Issues for Consideration and Debate at the Next Constitutional  
Convention ..... 731  
B. Douglas Anderson

*This Article examines and assesses the use of the home rule powers which were granted to local governments by the 1970 Constitution. Focusing primarily on the power of taxation, the Article notes that the use of the home rule powers has been restrained and generally successful. The Article points to narrow judicial reactions, however, which may conflict with the apparent intent of the constitution's drafters to grant broad authority to local government under the home rule powers.*

Reconsidering the Amendatory Veto in Illinois ..... 753  
Jack R. Van Der Silk

*This Article considers the controversy surrounding the governor's power of amendatory veto as provided in the 1970 Constitution, and whether this gives the governor too much power over pending legislation. The Article details the history and debate which led to the inclusion of this provision in the current constitutional document, explores the ways the amendatory veto has been used, and describes the ongoing battle between the legislature and the governor concerning its use. The Article concludes that procedural changes in the manner in which the power is used will result in a better balance between the two branches of government.*

A Search for Accountability: Judicial Discipline Under the Judicial  
Article of the 1970 Illinois Constitution ..... 781  
Pinky Wassenberg

*This Article addresses the authority of the Illinois Judicial Inquiry Board and the Illinois Courts Commission created by the 1970 Illinois Constitution. The Article focuses on the limitations placed on the authority of the Board and the Commission by the Illinois Supreme Court in the Harrod v. Illinois Courts Commission case, as well as the issue of who should be the final arbiter in matters concerning judicial discipline.*

Limits on State Taxation and Spending: Implications for the Illinois  
Constitutional Convention Referendum ..... 801  
J. Fred Giertz and David L. Chicoine

*This Article considers the use of constitutional restraints on the state’s power to tax and spend. The Article examines the effects of both traditional and specific limitations, and analyzes government growth rates, concluding that the traditional measures already in place in Illinois are adequate to control the size of state government without unduly restricting the state’s ability to perform necessary governmental functions.*

Increased and Accessible Judicial Rulemaking ..... 817  
Jeffrey A. Parness and Bruce Elliot Keller

*This Article discusses the problems which result from vesting the authority for making procedural rules governing the Illinois courts in both the General Assembly and the Illinois Supreme Court. After examining the constitutional history and applying policy rationales, the Article suggests that the constitution should give various types of primary authority for judicial rulemaking to the judiciary, with only secondary authority afforded to the legislature.*

The 1970 Illinois Constitution: First Two Decades—A Selected  
Bibliography ..... 845  
*Compiled by Ann Lousin*

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Volume 8

Summer 1988

Number 3

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## Foreword

The present Symposium Issue of the Northern Illinois University Law Review represents a milestone in the development of this journal. Even younger than the College of Law itself, the Law Review is presently concluding its eighth volume. This marks the first time that the Law Review has published a third issue in a volume, an increase which we anticipate will be maintained and eventually expanded still further in coming years.

The subject of this symposium and its distinguished roster of contributors have created considerable enthusiasm at the College of Law. The 1970 Illinois Constitution provided an unprecedented opportunity in Article XIV, Section 1(b) for Illinois voters to determine every twenty years whether a convention should be called to amend or revise the state constitution. The opportunity will be available for the first time in November, 1988. As Illinois provides no voter initiative method for specific amendment proposals, the automatic question provision of Section 1(b) has become vital to proponents of change who have been unable to persuade the legislature to bring constitutional amendments to the voters, such as those who seek to introduce "merit selection" of an appointed judiciary. The judicial article is one of many on which the contributing authors focus, in helping guide a judgment as to the desirability of convening a new constitutional convention.

There is much to be acknowledged in Stanley Mosk's article in this symposium pointing out the role that state constitutions have played and may play in the future in identifying, defining and extending individual rights against governmental action. Yet the bed-rock protections of the federal Bill of Rights, largely incorporated to protect against state action through the due process clause of the fourteenth amendment, and of the equal protection clause of the fourteenth amendment, have, in the opinion of this student of constitutional law, made state constitutional protections of individual rights for the most part incremental.

The major role of state constitutions is in establishing the processes of those governments which are closest to the people. Issues of home rule are analogous to issues of federalism, with the resolution of those issues usually even more important to the lives of individual citizens than the states rights issues with which federal courts have struggled. Issues of separation of powers are comparable at the state

and federal levels. Most important, the shaping of American democracy - the processes of representative government - is most significantly addressed in the charters which are state constitutions. This symposium is an attempt to raise the vital questions, and to suggest some possible answers.

The College of Law is grateful to the Illinois Bar Foundation for its support of this Symposium Issue. I would extend a particular measure of gratitude to Steve Brody, the Editor-in-Chief, and Bill Ellison, the Special Projects Editor, for their initiative, talent and perseverance in bringing this issue to print.

Leonard P. Strickman,  
Dean and Professor of Law,  
Northern Illinois University  
College of Law  
July, 1988

# Introduction

SAMUEL W. WITWER\*

It is hard to believe that almost twenty years have passed since the people of Illinois, pursuant to the old 1870 Illinois Constitution, voted in 1968 to call the Sixth Illinois Constitutional Convention which drafted our present Constitution. For most, if not all of the surviving delegates, numbering about 90 out of the original 116, the convention was an unforgettable experience, a highlight of our lives full of exciting and often dramatic events that we still recall as if they happened only yesterday. We have all watched with interest the application and interpretation of our common brain-child, the 1970 Illinois Constitution, over the intervening years.

One of the new provisions of the 1970 Constitution is the “automatic 20-year question” provided in Article XIV, Section 1(b), which for the first time in Illinois history, allows the people of our state to decide every twenty years whether or not to call a convention. This means that the General Assembly no longer has the sole discretion with respect to launching constitutional conventions. The Secretary of State, acting in a purely ministerial capacity, is required to place the question of calling a convention on the November general election ballot every twenty years unless within such period the General Assembly has done so. Inasmuch as the General Assembly has not done so since 1968, the automatic question provision of Section 1(b) has been triggered.

One of the reasons for the automatic provision was the fact that the 1870 Constitution had become virtually unamendable. It was the hope of the delegates to the 1969-70 convention that at reasonable intervals the people of our state would review their basic law and determine whether there were provisions needful of amendment and, if so, whether revisions should occur by separate amendments legislatively submitted or, instead, by the holding of an unlimited convention to deal with the Constitution in its entirety.

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\* B.A., Dickinson College; J.D., Harvard Law School; L.L.D., University of Illinois. Mr. Witwer, a Chicago attorney, served as President of the Sixth Illinois Constitutional Convention, which met from December 8, 1969 through September 3, 1970, and drafted the 1970 Illinois Constitution.



It is gratifying that a statewide review and debate has come to pass. Since the fall of 1987, scarcely a week has gone by that Illinois newspapers have not carried 'op-ed' columns, background pieces or plain news stories about the Constitution, how it has worked and whether improvements are necessary. *The Committee of 50 to Re-examine the Illinois Constitution*, a special commission of the General Assembly, has authorized a series of short papers on particular aspects of the Constitution, all written by noted Illinois academics.

What we have lacked until now, however, is a major over-all study sponsored by an Illinois law school. The Northern Illinois University Law Review has filled this void, I am happy to say, with this excellent Symposium Issue. The breadth and depth of the articles the Editors have gathered is amazing. Major articles presented include Professor Ann Lousin's "The 1970 Constitution: Has It Made A Difference?"—a superb, timely and scholarly overview of the important questions now before the state involving the workings of the Illinois Constitution; Professor Jack Van Der Slik's less extensive, although highly important study of the background and workings of the amendatory veto as it affects executive and legislative powers in the field of legislation; and Professor Nancy Ford's challenging study: "From Judicial Election to Merit Selection: A Time For Change In Illinois," posing serious questions concerning the judicial branch of Illinois government which will simply not go away.

Other scholarly papers deal with a wide sweep of Illinois constitutional concerns ranging from home-rule to judicial responsibility to matters of taxation and education. Together with Professor Lousin's extensive and scholarly bibliography, they combine to make this Symposium immensely valuable to Illinois voters who will soon be called upon to make an informed decision on the "automatic twenty-year question."

We can all be grateful to the *Northern Illinois University Law Review* for performing this important service to the people of Illinois; also, to the Illinois Bar Foundation for supporting the endeavor.

In closing this Introduction, I would wish to pay tribute to two distinguished Illinois lawyers who have never really received the credit due them for their decades of work in bringing about sound constitutional government in Illinois. One, unfortunately, died August 6, 1986. He was Rubin G. Cohn. He was, for decades, a professor of law at the University of Illinois, but the title of "professor" does not do him full justice. He served the people of our state in many special assignments which a series of governors often gave to him; he fought long and unflaggingly for a competent, honest state judiciary; and he was ever a brilliant lawyer, wise counselor, patient teacher, devoted



scholar and the mentor of many who strove to make Illinois a better place in which to live. He was also a dear friend and fellow lawyer whom I, along with many others, miss very much.

The other unsung hero of Illinois constitutional reform fortunately is here to read these lines. Few Illinoisans outside government and the bar have heard of Louis Ancel, yet all Illinoisans owe him a great debt. Tirelessly, yet always behind the scenes, he has worked to make the government of Illinois cities and villages modern and efficient and to make them better places in which to live. He has also worked to give Illinois a strong constitutional foundation for its state and local governments. As Professor Lousin suggests in the dedication of her Article to him, those of us who work in the vineyard of Illinois constitutional law know that Lou Ancel is always toiling diligently, if modestly, right alongside us.



# The 1970 Illinois Constitution: Has It Made A Difference?

ANN LOUSIN\*

On July 1, 1971, a new constitution became effective in Illinois. After seventeen years, with the possibility of a seventh constitutional convention appearing on the horizon, Illinoisans may fairly ask whether the 1970 Illinois Constitution has worn well. Has it met the

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\* Professor of Law, The John Marshall Law School, Chicago, Illinois; B.A. Grinnell College; Graduate Studies, University of Heidelberg (Germany); J.D. University of Chicago. She was a Research Assistant at the Sixth Illinois Constitutional Convention (1969-70); Staff to the Committee on Constitutional Implementation, Illinois House of Representatives (1971-73); and Parliamentarian of the Illinois House of Representatives (1973-75).

## *Author's Note*

The genesis of this article is a chapter I wrote in 1979 for *Illinois: Political Process and Governmental Performance*, a collection of readings edited by Edgar G. Crane and published in 1980. In 1987, when the issue of a constitutional convention to revise the 1970 Illinois Constitution arose, Louis Ancel asked me to study the effect of the constitution. He generously supported the publication and distribution of the report I wrote in the summer of 1987. That report is, in turn, the pre-cursor of the article that follows.

This article is only a short overview, not a detailed study. It concentrates only upon case law, statutes and my observations and opinions based upon eighteen years serving in and studying Illinois government. The reader seeking other articles on the subjects my article discusses should consult the ensuing bibliography, which I have tried to make current as of spring, 1988.

I owe thanks to the several kind souls whose comments improved the 1979 chapter, particularly the late Professor Rubin G. Cohn, and to those whose comments improved the 1987 report, Joan G. Anderson, William L. Day and Samuel W. Witwer. Thanks are also due to Anita Silver, typist and reader, and Andrew Siegel, my research assistant.

Above all, I thank Louis Ancel, who is, as the simple saying goes, "of the Chicago bar." His decades of experience as the dean of municipal lawyers in Illinois have not made him parochial; indeed, he is one of those rare far-sighted people who see beyond their own specialties and try to use their skills and influence to better the lives of generations to come. He supported the cause of constitutional reform long before 1968, but he has never received credit for his many accomplishments. Yet, those of us who toil in this vineyard know Lou is working alongside us.

To Lou Ancel, therefore, I dedicate this article with deep respect and gratitude.



present needs of the people who adopted it in 1970? Has it enabled the citizens and their public officials to solve problems that have arisen since 1971? Will it help solve the problems of the 1990's? Should Illinoisans call another constitutional convention?

This essay defines the nature of a state constitution and sketches the history of the Illinois constitutions. It divides the constitution drafted in 1970 into ten topics or areas, each concerning problems addressed by the constitution. It notes what the delegates to the constitutional convention considered at that time to be the most important issues within each area, discusses how the convention attempted to resolve those issues, analyzes the effectiveness of the constitutional solutions during the past seventeen years and suggests ways in which the 1970 Constitution may help or hinder the solution of the key problems appearing as Illinois enters the last decade of the century.

#### THE ROLE OF CONSTITUTIONS IN ILLINOIS

It is not easy to define the role of an American state constitution or to ascertain its impact on the public and private lives of that state's citizens. Samuel W. Witwer, who served as President of the constitutional convention that drafted the 1970 Illinois Constitution, defined a constitution as "an accepted body of organic laws which structures the government of a state; limits the powers of the legislative, executive, and judicial branches; and guarantees the rights, immunities, and liberties of the people."<sup>1</sup>

Benjamin N. Cardozo, a great jurist and an Associate Justice of the United States Supreme Court, spoke more generally when he warned that "a constitution states, or ought to state, not rules for the passing hour but principles for an expanding future."<sup>2</sup> Witwer and Cardozo would agree, however, that a constitution should not contain provisions on the rights of the people and powers of the government which are so detailed and so limited to current problems that they trivialize the constitution or hamstring future generations, at worst.

There are two great obstacles in the path of those seeking to write a constitution containing only "principles for an expanding future." First, it is much easier to ascertain the problems of "the

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1. J. CORNELIUS, *CONSTITUTION MAKING IN ILLINOIS, 1818-1970* (1972).

2. As quoted by Mr. Witwer in his address to the Sixth Illinois Constitutional Convention, *RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION* Vol. II 31 [hereinafter cited as *RECORD OF PROCEEDINGS*].



passing hour” and to write rules to solve those problems than it is to forecast the problems of the future and establish guidelines to avoid or remedy them. Second, a modern state constitution must be submitted to the electorate for ratification. The voters, or at least special interest groups, are likely to be more interested in the proposed constitution’s solutions to the concrete problems of today than in its guidelines for solving the potential problems of tomorrow. Consequently, a modern state constitution must meet two tests: it must be “relevant” enough to convince special interest groups and the electorate that it meets the needs of the present, and it must be flexible enough to meet the needs of unborn generations.<sup>3</sup>

The 1970 Illinois Constitution, the fourth basic charter of the state, may well meet those tests better than the charters which preceded it: the Constitutions of 1818, 1848 and 1870. Preferences in constitutions, as in styles of clothing, are subject to changes in fashion. The 1818 Constitution was an example of the rather aristocratic, neo-Federalist style popular in the early nineteenth century. The 1848 Constitution was an example of frontier populism, the triumph of Jacksonian democracy over the Atlantic seaboard elite. The 1870 Constitution was a typical late-nineteenth century charter. Created during the economic and social depression caused by the Civil War, it was designed for an agrarian state in which what little urban life existed was centered in small towns. Even Chicago, already the largest city in Illinois, was not the booming center of a giant metropolitan area that it is today. The 1870 Constitution reflected that society. Perhaps the chief characteristic of this constitution was its long lists of restrictions on the institutions of government, particularly the powers of the General Assembly.<sup>4</sup>

One way to alleviate a “tight” constitution, such as the 1870 Illinois Constitution, is to facilitate amending the constitution. The drafters of the 1870 Constitution did not intend to make it very difficult to amend their handiwork—at least as long as both political parties agreed to an amendment. Through a series of historical accidents, the 1870 Constitution came to be very difficult to amend

---

3. The first Illinois constitution was drafted in 1818 to satisfy Congress’ requirements for elevation from territorial status to full statehood. Congress did not, however, require that this charter be submitted to the Illinois electorate for adoption. Perhaps that is why it is by far the shortest and “loosest” of the four Illinois Constitutions.

4. See, e.g., ILL. CONST. of 1870 art. IV, §22, which seeks to prevent passage of special and local laws.

by the early twentieth century.<sup>5</sup> When attempts to alter the 1870 Constitution proved unsuccessful, many citizens and scholars began arguing that only a totally new document could provide Illinois with a modern constitution—and only a constitutional convention could design a totally new document. The Fifth Illinois Constitutional Convention proposed the 1922 Constitution, but the electorate rejected their draft. By mid-century, the forces for constitutional revision once more began to urge the legislature to submit the question of a call for a constitutional convention to the electorate. Writing a new document, it seemed, was better than piecemeal reform.

The stories of the call for the Sixth Illinois Constitutional Convention, of the election of the 116 delegates to the convention, of the proceedings of the convention and of the climactic day when the voters adopted the constitution proposed by the delegates have all been told well elsewhere and do not warrant lengthy repetition here.<sup>6</sup> It suffices to note that in November, 1968, the people voted to call a convention; that they elected two delegates from each of the 58 state senatorial districts in November, 1969; that the convention met from December 8, 1969, through September 3, 1970; that the people adopted the new constitution on December 15, 1970;<sup>7</sup> and that virtually all of the constitution became effective on July 1, 1971.

Many, perhaps most, of the people who voted to adopt the Constitution in 1970 hoped that it would help solve the political, economic and social problems of that day and of the future. What was in their new constitution? Although the constitution has a preamble and fourteen articles, it really addresses only ten major areas of concern. The next ten parts of this essay discuss how the constitution has affected each of those areas. Each part analyzes the impact of the constitution upon “the passing hour” and “the expanding future” in relation to each of those areas.

## I. STATUTE OR BASIC CHARTER?

(Article XIV; Sections of the 1870 Constitution Deleted)

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5. For a good account of the historical accidents which resulted in a restrictive amending article see Bergstrom, *The Amending Process*, in S. GOVE & V. RANNEY, CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 465 (1970).

6. See particularly J. CORNELIUS, *supra* note 1, at 121-163; S. GOVE & T. KITSOS, REVISION SUCCESS: THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1984); E. GERTZ & J. PISCOTTE, CHARTER FOR A NEW AGE (1980); E. GERTZ & E. GILBRETH, QUEST FOR A CONSTITUTION: A MAN WHO WOULDN'T QUIT 70-207 (1984).

7. The vote totals on the referendum whether to adopt the 1970 Constitution was:

For: 1,122,425; Against: 838,168.



The first provisions considered by the 1970 Constitutional Convention delegates were those relating to the role of a state constitution. The 1870 charter was notorious for certain provisions that should have been placed instead in statutes so that they could have been repealed more easily when they became superfluous. In short order, the delegates voted to exclude from a new constitution such non-controversial and even quaint provisions as those relating to the World's Columbian Exposition held in Chicago in 1893 and to the expenditures for the state capitol, which was built before 1900.<sup>8</sup> The debate on these sections was so dull that Victor A. Arrigo, a delegate of Italian birth and parentage, provided the only excitement of the day by offering a semi-serious protest against the first deletion, on the grounds that it was an affront to the sacred memory of Christopher Columbus.<sup>9</sup>

Although these early deletions were not important in themselves, the convention's vote to delete them at the outset was significant. The delegates decided that the deleted provisions had concerned matters better left to the General Assembly, and they wanted the new constitution to contain only the guidelines necessary for future generations to govern, rather than "rules for an hour" which would pass all too soon. The delegates did not formally and openly make this judgment; indeed, they may not have been fully conscious of their decision. The consequences, however, were that the new constitution would be "loose," not "tight," and it would contain less "legislative detail" than its predecessor. Of course, as the convention progressed, the delegates found themselves abandoning the goal of drafting only "principles for an expanding future" in order to placate the fears or wishes of a group of delegates or of an outside pressure group. By and large, however, they resisted including many, if not most, of the proffered restrictions and special-interest provisions.

The first major article considered by the delegates tested their conscious or unconscious decision to resist writing a fundamental

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8. It should not be assumed that all of the deletions proposed by the Committee on General Government were merely "clean-up exercises" and totally noncontroversial. Those which proposed abolition of the ban on lotteries, of the provision granting the Illinois Central Railroad a special charter, and of restrictions on corporate charters were particularly controversial. In fact, the problem of the constitutional prohibition of branch banking was one of the bitterest issues of the convention from beginning to end, as the discussion of economic regulation shows. See *infra* text accompanying footnotes 229-36. Nonetheless, the deletions considered at the very beginning were scarcely controversial.

9. RECORD OF PROCEEDINGS, *supra* note 2, Vol. II at 615-17.



statute rather than a fundamental constitution. This was Article XIV, "Constitutional Revision," the article that establishes the manner by which the people may later amend their constitution. As the delegates knew, any game must be played according to rules. However, they knew as well that the players must have the right to change the rules from time to time, and the most important rule is the one establishing how the players may change the rules. The delegates also knew that the 1870 Constitution's inadequacy was due in part to the inflexibility of its amending article and that the voters now wanted a constitution they could amend more easily.

Illinois has traditionally provided for constitutional amendment by one of two methods: (1) the calling of a constitutional convention, or (2) the legislative submission of an amendment to the electorate for ratification. All 116 delegates were experiencing the convention method, and most had observed the second method through campaigns for constitutional amendments over the years.

Article XIV, Section 1 of the 1970 Constitution makes two major changes in its predecessor provision on constitutional conventions. The first is that it lowers, from two-thirds to three-fifths, the majority needed in each house of the legislature to propose a constitutional convention and at a popular referendum to adopt the convention's product. The other change is potentially one of the most important in the entire document: if the question of a convention call is not submitted for twenty years, the Secretary of State must submit the question to the people at the next November election. The purpose of this automatic submission of the question of a call for a constitutional convention is to allow the electorate to consider this major issue at least once every other decade.

In 1985, some observers thought that if the legislature, which controls the other avenue to constitutional revision, perceived that the public wanted a convention called in 1988, the General Assembly would forestall a campaign to approve a call by submitting a large number of constitutional amendments, particularly those relating to such important questions as judicial selection, in 1986. The legislature did no such thing, probably because there was no perceived groundswell of public opinion for a convention.

Although the bare text of Article XIV, Section 1(b) arguably may be ambiguous enough to permit a call in 1988 or 1992, the debates of the 1970 Convention absolutely clarify this issue. The call must be submitted in November, 1988, twenty years after the last submission of a call.<sup>10</sup> On September 17, 1987 the Attorney General of Illinois,

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10. The Report of the Committee on Suffrage and Amending specifically says

Neil Hartigan, formally advised the Secretary of State, Jim Edgar, that he must submit the question to referendum at the general election in November, 1988.<sup>11</sup>

The convention also made two important changes in legislative submission of amendments to the people for their approval or rejection. It lowered, from two-thirds to three-fifths, the vote needed in each house to approve the submission of an amendment. It also lowered, from two-thirds to three-fifths, the vote needed to approve the amendment at a referendum.

By lowering the majority approval required for legislative amendment, the delegates hoped to facilitate the modernization of specific parts of the constitution without the expense of calling a constitutional convention. The three-fifths requirement seemed reasonable because the 1970 population of Illinois fell into three almost equal groups: Chicago; the Suburbs (suburban Cook and the five "collar" counties); and Downstate (the 96 other counties). A two-thirds requirement would have enabled one segment of the state's population to frustrate the will of the other two, whereas a three-fifths requirement requires the opposing third to secure the cooperation of some of the members of the majority to block an amendment.

Since 1970, the legislature has submitted eight proposed amendments, three of them virtually identical. In 1974, it proposed an amendment restricting the Governor's power to use an amendatory veto. In 1978, it submitted an amendment allowing the exemption of veterans' organizations' post homes from property taxation and an amendment designed to repeal the 1970 Constitution's abolition of the *ad valorem* personal property tax in 1979. None passed. These early failures were perhaps surprising in view of the lowered majority now needed. However, the three amendments submitted were "low profile" issues—relatively non-controversial, or at least not emotionally charged, as far as most voters and the press were concerned.

In 1980, when the voters approved the Cutback Amendment, which was placed on the ballot pursuant to Article XIV, Section 3, the voters also approved a legislatively-submitted amendment designed to alleviate the difficulties of owners of property sold at delinquent tax sales. In 1982 and 1986, the voters approved amendments to Article I, Section 7, the net effect of which is to leave the granting

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so at RECORD OF PROCEEDINGS, *supra* note 2, Vol. VII at 2268-69, and the colloquies between the chair of the committee and delegates clearly buttress this conclusion. RECORD OF PROCEEDINGS, *supra* note 2, Vol. II at 491-96; RECORD OF PROCEEDINGS, *supra* note 2, Vol. IV at 3598-99.

11. Op. Att'y Gen., Sept. 17, 1987, File No. 87-007.



of bail to judges' discretion in felony cases. In 1984 and 1986, the voters rejected the veterans' post home tax exemption twice more.<sup>12</sup>

Sections 3 and 4 of Article XIV are completely new to Illinois. Although the delegates gave them less attention than they gave Sections 1 and 2, these new provisions have proven to be both controversial and the subject of novel court decisions.

Section 3 provides for a "limited initiative" method of amending Article IV of the constitution, which deals with the legislature. In adopting Section 3, the delegates in effect rejected the Progressive Movement's proposal, popular about 1900, that an effective way to combat legislative inefficiency and corruption was to allow the electors themselves to initiate substantive legislation and constitutional amendments. In a state which has the "initiative," a petition for such a "proposition" that receives enough signatures is enough to place the proposition on the ballot to be voted on at a referendum.<sup>13</sup> The key to the "initiative and referendum" method of popular control over the legislature is the bypass of the legislature. The 1970 delegates chose instead to write a constitution which they hoped would strengthen the legislative process and make it so open and responsive to the public's needs and will that an initiative and referendum procedure—for substantive matters, at least—would be unnecessary.

However, the delegates also realized that some aspects of the legislative process are so dear to legislators' hearts that the legislature itself would never change them. Uppermost in the delegates' minds was the recent battle over Congressional and state legislative reapportionment, a battle that was fought in the federal courts because the state legislatures were unwilling to give up the power to gerrymander, a cornerstone of their political maneuvering.

The delegates were also mindful of the controversy over Illinois' unique method of electing members of the Illinois House of Representatives. Since 1870, the House had been divided into districts, from which three members were elected by "cumulative voting," a device which allowed a voter to cast all three of his votes for one candidate

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12. For a summary of amendments under the 1970 Constitution, see Gaudet, *Amending the State's Constitution*, 11 ILL. ISSUES 30 (Nov. 1986).

13. California is the leader in using this device. The two most famous California constitutional amendments to be initiated and adopted without legislative approval are Proposition 14, the 1968 attempt to ban open housing laws which the United States Supreme Court declared unconstitutional in *Mulkey v. Reitman*, 387 U.S. 369 (1967), and Proposition 13, the 1978 attempt to limit *ad valorem* real property taxes. It is ironic that the Progressives, who created the initiative and referendum, would almost certainly have opposed these two uses of it.



(the “bullet vote”) or to apportion them equally among two or three candidates. This method, first hailed as a creative attempt to introduce the best features of the continental European proportional representation system into an American state legislature, was the subject of much criticism by 1970. The Illinois League of Women Voters and many academics and delegates thought that the system had long since ceased to fulfill any useful purpose and, worse, confused the electorate. Opponents said that the goal of insuring “minority representation,” however valuable it may have been in a sharply partisan Illinois in 1870, had been perverted by 1970. The system virtually guaranteed that each of the two major political parties could seat one of three representatives from a district even if the vote cast for that member was well under one-third of the total popular vote and the majority of the voters of the district clearly did not want that candidate elected. This result, opponents said, was anti-majoritarian and served no good purpose.<sup>14</sup> Supporters of the status quo, including many legislators, denied these charges.

The Illinois General Assembly, quite naturally, had refused to abandon the system that had enabled the election of all of the members of the House and in their turn many members of the Senate, who often served in the House before running for the Senate. By 1970, many delegates thought that only a constitutional convention could abolish the present system. Other delegates strongly favored retention of multi-member districts with cumulative voting. Numerous legislators lobbied the delegates on this issue, and several state representatives threatened to oppose the constitution unless it retained the system then in effect.

The delegates agreed upon a two-pronged compromise between their faith in an improved legislature and the legislature’s occasional intransigence. First, they decided to submit the “multi-member districts with cumulative voting vs. single-member district” issue to the people as one of the four controversial issues to be voted upon as separate “side-elections.” These side-elections on the separately submitted issues were held during the referendum at which the body of the constitution was submitted on December 15, 1970. This happy solution defused these four issues at the convention, prevented the convention’s breaking up over them and transferred the battles over

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14. For extended arguments against this system and in favor of the usual “single member district” system, see Minority Reports 1A and 1C to the Committee on the Legislature’s Proposal, RECORD OF PROCEEDINGS, *supra* note 2, Vol. VI at 1413, 1463.

each to the public arena. Second, they created an initiative and referendum procedure, but they limited its scope to amending only the “structural and procedural subjects contained in Article IV” (the article on the legislature). Although it is unclear whether the delegates intended this limited initiative to cover more than the obvious controversies—for example, reapportionment, bicameralism, the method of election of the House and the size of the General Assembly—those issues were uppermost in their minds. One must remember that the initiative and referendum method of amending the constitution was totally new to Illinois constitutional philosophy.

The new method was tested in 1976, when an organization called the Coalition for Political Honesty, in accordance with Article XIV, Section 3, circulated a petition calling for a referendum on three amendments to the legislative article. One amendment prohibited legislators from having any other public job, while a second required them to declare a “conflict of interest” in a bill and refrain from voting on it. The third, by far the most popular with those signing the petitions, prohibited the practice, then sanctioned by statute, of drawing the salary for the entire legislative biennium at the beginning of the two-year term.

When it became apparent that circulators of the petition had garnered enough signatures, five former delegates and a former staff member of the convention filed a suit to prevent the submission of the amendments at the November, 1976 election. In *Gertz v. State Board of Elections*,<sup>15</sup> the Illinois Supreme Court held that any proposed amendment must meet two tests: (1) the amendment must relate to “subjects contained in Article IV,” eliminating, for instance, the possibility of an amendment on taxes being grafted onto Article IV; and (2) the amendment must be both “structural” and “procedural.” Although the opinion of the court did not specifically address the three amendments separately, probably at least one, the prohibition on a legislator’s voting on bills in which he had a “conflict of interest,” was indeed “procedural” in nature. However, because none of the amendments was both structural and procedural, none of them was proper under Article XIV, Section 3. In this section, the word “and” is a conjunctive, not a disjunctive.

Regardless of how one might feel about the merits of the three amendments, or even about the reasoning of the court, it is clear that this is one of the most significant decisions on the 1970 Illinois Constitution. The two tests established by the court are so difficult

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15. 65 Ill. 2d 453, 359 N.E.2d 138 (1976). The author was one of the plaintiffs.



to meet that very few, if any, controversies other than those precisely envisioned by the delegates could be the subject of a constitutional amendment initiated by citizen petitions. The overall impact of the 1976 case was that, except for those very few relatively well-defined matters for which the initiative method is especially appropriate, constitutional amendments would occur by a simple, two-step process: (1) either a constitutional convention or the General Assembly will write an amendment; and (2) the electorate will either reject or adopt it.

In 1980, the Coalition for Political Honesty helped lead the campaign for the Cutback Amendment, which sought to substitute single-member districts for multi-member districts for election to the House of Representatives, to abolish cumulative voting and to reduce the number of State Representatives by one-third. Proponents of the status quo, led by several current and former state representatives, led the opposition. The Illinois Supreme Court found this use of the petition system to be valid and allowed it to be submitted to the electorate.<sup>16</sup> The amendment passed, and in 1981 the General Assembly redistricted on the basis of 59 members of the Senate and 118 members of the House. In 1982 and since, the members of the House have been elected from "legislative districts," each of which is half a "senatorial district."

The third test of Article XIV, Section 3 came in 1982, when the Coalition sought to have an amendment allowing the initiative and referendum to enact legislation. This was the first of the trio of reforms so dear to turn-of-the-century Progressives: initiative, referendum and recall. Although the idea gained favor then, especially west of the Mississippi, many modern populists are less enthusiastic about a device that allows a legislature to shirk responsibility for deciding tough issues and allows a dedicated, organized group to draft and submit unamendable bills to the public, bills that often become the subject of professionally-managed political campaigns themselves.

The Coalition had to use Article XIV, Section 3 to obtain this amendment to Article IV. When the Illinois Appellate Court held this to be an improper use of the petition procedure,<sup>17</sup> the Illinois Supreme Court refused to hear the Coalition's appeal. As a result of all three cases, then, amending the Illinois Constitution by initiative seems to

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16. *Coalition for Political Honesty v. State Bd. of Elections*, 83 Ill. 2d 236, 415 N.E.2d 368 (1980).

17. *Lousin v. State Bd. of Elections*, 108 Ill. App. 3d 496, 504, 438 N.E.2d 1241, 1246 (1982). The author was the lead plaintiff.



be limited to narrowly and clearly-defined structural and procedural changes in the legislature. Now that the Cutback Amendment has effected the most popular change in the structure of the General Assembly, there is apparently no issue within the defined scope of Article XIV, Section 3, that could seize the public's attention. Amending the Illinois Constitution, therefore, seems to be primarily a matter for the General Assembly (Art. XIV, § 2) or a convention elected by the people (Art. XIV, § 1), and only secondarily a matter for initiative and referendum (Art. XIV, §3).

Section 4 of Article XIV is unique because it concerns amendments to the United States, not the Illinois, Constitution. The delegates were aware that several proposals for calling a federal constitutional convention had received the approval of many state legislatures during the 1960's. The motive behind most of these proposals was to reverse the Supreme Court on several decisions, particularly those mandating reapportionment of state legislatures and restricting religious observances in the public schools. The apparent ease and alacrity with which state legislatures ratified these proposals alarmed many delegates. In an effort to make the process more deliberative, the convention established two requirements in Section 4. The first is that, between the time a proposed federal amendment is submitted by Congress to the states and the time the Illinois Legislature may consider its ratification, a majority of the members of the Illinois Legislature must have been elected. The second is that a vote of three-fifths of the members of each house of the legislature is necessary to call for a federal constitutional convention, to call for a state convention to ratify a proposed federal amendment and to ratify an amendment submitted by Congress to the state legislatures.

Apparently the delegates never fully considered the impact of this section. Only four years after its creation, a federal court declared both requirements repugnant to the United States Constitution in *Dyer v. Blair*,<sup>18</sup> a case brought during the campaign to win Illinois ratification of the proposed Equal Rights Amendment, "E.R.A."

Even in 1970, the first requirement of Article XIV, Section 4 was clearly in violation of the federal constitution.<sup>19</sup> The constitutionality of the second requirement was more debatable. It seems unnecessary, however, in view of the two-thirds vote requirements of Article V of the United States Constitution: that the approval of two-thirds of Congress is necessary to propose a federal constitutional amendment,

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18. 390 F. Supp. 1291 (N.D. Ill. 1974).

19. *Leser v. Garnett*, 258 U.S. 130 (1922).

or that two-thirds of the states must call a federal constitutional convention to propose an amendment; and that ratification by three-fourths of the states is necessary to adopt such an amendment. The federal court in *Dyer* held that a state constitution cannot require an extraordinary majority for legislative approval of a proposed amendment to the federal constitution. Ironically, the court also held that either house could establish its own rules for ratification, including a three-fifths vote requirement, as long as the rules were reasonable. The General Assembly can thus do by rules, which it can change virtually every day, that which the citizens voting at a constitutional referendum cannot do.

It is ironic as well that so far the only federal constitutional amendment affected by this novel provision is one probably favored by most of the "liberal" delegates, the ones who were most alarmed at what they perceived as the easy approval of "conservative" amendments. Finally, the only reason for the three-fifths majority requirement in the rules and parliamentary rulings of each chamber was the decision by the leaders of each house to conform legislative practice to the new Illinois Constitution. Before 1971, neither house had ever required an extraordinary majority to approve a proposed federal amendment.

Article XIV, Section 4 is the only provision of the 1970 Illinois Constitution thus far to have been held unconstitutional under the United States Constitution. This Section provides a sorry distinction, and is an unhappy and ironic consequence of an ill-thought-out attempt by some delegates to stall the ratification of federal amendments they did not like. The practical effect of the provision is to place into the hands of a majority of each house the power to change the requirements for ratification of any federal constitutional proposal, increasing or decreasing its chances for ratification as a majority of each house sees fit. The real test of the legislators' devotion to an extraordinary majority requirement as a matter of political philosophy, as opposed to their desire to conform to the 1970 Illinois Constitution, will arise when a "conservative" proposal to amend the federal constitution comes to a vote in the General Assembly. For example, what will be the vote requirement on the proposal to call a federal constitutional convention to consider a "balanced budget" amendment?

## II. THE BASIC PRINCIPLES OF GOVERNMENT

(Preamble; Article II; and Article XIII, §§1-4)



Six sections of the constitution and the Preamble specify some of the convention's fundamental assumptions about the purpose and principles of Illinois government. The Preamble is largely the same as that of the 1870 Constitution, which in turn owed much to the majestic simplicity of the Preamble to the United States Constitution. However, the Preamble to the 1970 Constitution adds boldly that its purposes include "to . . . maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; [and] provide opportunity for the fullest development of the individual. . . ." This additional language shows that the delegates were products of the mid-twentieth century: they firmly believed that it is the purpose of government to aid the individual and to promote his individual well-being, not merely to refrain from doing him harm. The new words of the Preamble make it easier to understand why the delegates drafted provisions prohibiting discrimination,<sup>20</sup> promoting education<sup>21</sup> and generally committing the resources of Illinois government to improving the quality of life in Illinois.

#### A. SEPARATION OF POWERS

Article II establishes the basic powers of state government and specifies that the legislative, executive and judicial branches may not exercise each other's powers. This has long been a standard provision in most state constitutions, including the 1870 Illinois Constitution.

The rapid growth of the administrative agencies in recent years has created a dilemma for the separation of powers doctrine. Most administrative agencies, whether federal or state, perform some functions that are arguably "executive" in nature, some that are arguably "legislative" and some that are arguably "judicial." The Illinois Supreme Court has held that the separation of powers doctrine does not prohibit the intermingling of some of the powers of the branches in one agency; it prohibits only the lodging of all of the power of one branch in another one.<sup>22</sup>

#### B. SOVEREIGN IMMUNITY

Article XIII, Section 4 is not well known, but it affects the lives of everyone who is the victim of a tort committed by an employee of

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20. ILL. CONST. art. I, §§17, 18 and 19.

21. ILL. CONST. art. X, §1.

22. *In re Barker's Estate*, 63 Ill. 2d 113, 345 N.E.2d 484 (1976); *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 311 N.E.2d 146 (1974); *People v. Brumfield*, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977).



the state or a local government, e.g., someone who is injured by a CTA bus in an accident. The traditional rule in such tort cases, called "sovereign immunity," is that no one can sue a government without its consent if the governmental employee was engaged in a governmental function.<sup>23</sup> The new constitution abolishes that rule.

Pursuant to the 1870 Constitution, Illinois had established a Court of Claims, an administrative court that adjudicated such private claims against the state. In effect, then, Illinois had decided to "consent" to suits before 1970.<sup>24</sup> The significance of Article XIII, Section 4 lies in its implicit acknowledgment of a policy that the government ought not be able to commit a tort with impunity. The "sovereign" cannot be immune because the true sovereign is the people, not the government.

### C. GOVERNMENTAL ETHICS

The first three sections of Article XIII are very important because they establish high standards of conduct for public officials. Section 3 establishes a modern form of the traditional oath of office taken by holders of state offices or positions created by the constitution. Section 1 strengthens the similar provision of the 1870 Constitution and declares a person convicted of "a felony, bribery, perjury or other infamous crimes" to be ineligible to hold an office created by the constitution. Although it allows the legislature to restore a convict's eligibility to hold office, the General Assembly has not done so. The state officials convicted of bribery or of crimes amounting to bribery in recent years are thus still unable to hold office again.

The recent cases on public officials' dishonesty have clarified the terms in Section 1. A "conviction" occurs when the judge enters the order of a judgment of conviction, even though the defendant appeals.<sup>25</sup> An "infamous crime" is one "inconsistent with commonly accepted principles of honesty and decency."<sup>26</sup> There is no question that the office is vacant as soon as there is a "conviction" for an "infamous crime" under either federal or state law.

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23. For a definition of this rather elusive concept, see GIFIS' LAW DICTIONARY 196 (1975) upon which the definition in the text is based.

24. ILL. REV. STAT., ch. 37, para. 439.1-439.25 (1983).

25. *People ex rel. Taborski v. Illinois Appellate Court, First District*, 50 Ill. 2d 336, 278 N.E.2d 796 (1972); ILL. REV. STAT. ch. 46, para.25-2; ILL. REV. STAT. ch. 38, para.2-5 (1985). *But see People ex rel. Grogan v. Lisinski*, 113 Ill. App. 3d 276, 446 N.E.2d 1251 (1983) (conviction occurs when sentence is imposed).

26. *People ex rel. City of Kankakee v. Morris*, 126 Ill. App. 3d 722, 726, 467 N.E.2d 589, 592 (1984).

The most innovative of the three "ethics" provisions is Section 2, which had no counterpart in the 1870 Constitution. It requires every state officer or holder of an office created by the constitution to file a statement of his economic interests. If the officeholder fails to file this report on his finances, he forfeits his position. Section 2 also allows any branch of government to establish ethical standards for that branch, and empowers the General Assembly to require financial disclosure reports of local government and school district officers.

Section 2 is a strong provision that could be of great use to citizens seeking to know whether their public officials hold financial interests that could conflict with their public duties. It can also be a source of abuse, however, because it may force candidates for even minor offices to divulge the personal holdings of their families, even if these holdings do not give rise to any questions of public honesty. This inherent conflict between the public's right to know and the individual officeholder's right to privacy became critical when the General Assembly passed the Illinois Government Ethics Act to implement Section 2. The Illinois Supreme Court resolved the conflict in favor of the public's right to know when it upheld the Act's constitutionality.<sup>27</sup>

After the basic constitutional issue had been settled, problems arose because of attempts by the governor to enforce the Section 2 standards. The first conflict evolved from an executive order issued by Governor Dan Walker that required most employees of agencies subject to him to file separate statements of financial disclosure and copies of their income tax returns with a Board of Ethics appointed by the Governor. In *Illinois State Employees' Ass'n v. Walker*,<sup>28</sup> the Illinois Supreme Court held that Walker, as head of the executive branch, could require such extensive disclosure from his employees, because the income tax records were for the use of the Governor in assigning people to sensitive positions and were not made public.

A second problem arose from another executive order requiring both regulated businesses and those seeking to sell goods or services to agencies of the state responsible to him to disclose their political

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27. *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *cert. denied*, 412 U.S. 925 (1973) (the U.S. Supreme Court refused to hear an appeal which contended that the Illinois constitutional requirement violated officeholders' rights to privacy and to seek office).

28. 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied*, 419 U.S. 1058 (1974) (again, the U.S. Supreme Court refused to hear an appeal based on federal constitutional rights).



campaign contributions. Here the court drew the line on the public's or the Governor's "right to know," holding that the Governor had no power to require this type of disclosure from people outside state government.<sup>29</sup>

Recently problems have arisen with the language in Section 2 imposing the severe, perhaps Draconian, penalty of forfeiture of office upon those who fail to file "within the time prescribed" by the legislative act implementing this provision. In 1972, an opinion of the Illinois Attorney General<sup>30</sup> upheld the rather plain meaning of this language. After some candidates for public office failed to file in the early 1970's, there were routine and timely filings. Candidates for,<sup>31</sup> as well as holders of, public office apparently understood they were required to file.

In 1984, when the Mayor of Chicago, Harold Washington, failed to file in time, his opponents in the City Council declared he had forfeited office, but their efforts failed when state law enforcement officials refused to proceed against the Mayor.

It is difficult at present to assess the effects of Article XIII, Section 2 and the three reported decisions interpreting it. There is no evidence that any candidates have refused to run for public office because of the economic disclosure requirement. On the other hand, there is some evidence that the citizens and press are not interested in the contents of public officials' disclosure statements.<sup>32</sup> Similarly, there is no way to determine whether the disclosure requirement has caused officeholders to refrain from unethical practices. For the moment, Article XIII, Section 2 seems to be a requirement which has neither cleansed the state of corruption nor driven the best people from office.<sup>33</sup>

### III. SUFFRAGE AND ELECTIONS

(Article III and Separate Proposition 4)

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29. Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502 (1974).

30. Op. Att'y Gen. No. S-514 (1972).

31. Havens v. Miller, 102 Ill. App. 3d 558, 429 N.E.2d 1292 (1981) (holding candidates were covered).

32. *Economic Disclosure Statements* 3 ILL. ISSUES 16 (Jan. 1977).

33. The author, in her capacity as Chairman of the State Civil Service Commission, filed statements of economic interest pursuant to both the Illinois Government Ethics Act and gubernatorial executive order between 1977 and 1983; she considered the latter a more detailed report.



The most heatedly debated issue on suffrage and elections at the 1970 Convention was that of lowering the voting age for state and local elections to 18. A half-generation later, it is hard to remember the apprehension over allowing "the kids" to vote. The debate was nation-wide because feelings about the Vietnam War and about the college students' responses to it affected positions taken for or against the proposal.

It suffices to note that the delegates submitted the issue to the voters as one of the four separate questions voted upon at the constitutional referendum on December 15, 1970. The voters rejected the proposal. Ironically, the United States Supreme Court upheld the congressional act lowering the voting age for federal elections<sup>34</sup> only a week later. Further, the 26th Amendment to the United States Constitution, lowering the voting age for state and local elections as well, became effective a few months later. Whether the Illinois electors would have voted for extending the franchise to 18-, 19- and 20-year-old Illinoisans if they had known of either of these developments, must remain an historical "if."

The second most important issue related to voting was the regular, fair conduct of elections. Charges of widespread fraud in registration and voting, particularly in Chicago, were prevalent, and had been so for decades. In addition, in 1970, the delegates were particularly concerned with fairness, not just fraud, in the administration of elections. Several delegates had experienced what they considered unfair treatment in their races for the constitutional convention, especially those who had never run for office before and were unfamiliar with the intricacies of filing procedures. Some discovered that local election officials were reluctant to give help and information to candidates who belonged to the other political party or, worst of all, who were non-partisan or "independent."

The most controversial treatment of candidates for membership in the convention came at the hands of Paul Powell, who was Secretary of State in 1969 when the elections for membership in the convention took place. Powell, who by virtue of his office was the chief administrator of state elections, openly placed the names of candidates he most favored first on the ballot and those he least favored last on the ballot. Presumably, voters are more likely to vote for candidates whose names appeared at the top of the ballot. Since many of those running for "Con Con" had never run for office before, they were incensed at Powell's favoritism, particularly since

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34. *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970).

the elections for membership in the convention were on a non-partisan basis, and many of those running were not from the usual party ranks. Although a federal court forced Powell to change his practices, Powell's actions and total lack of remorse over them sharpened the delegates' perception that one person had too much discretion in running elections.<sup>35</sup>

Another obstacle faced by those running for membership in the convention was inconsistent treatment by local election officials. These officials—county clerks and, in certain areas, Boards of Election Commissioners—sometimes treated individual candidates in a disparate manner, and officials in some election areas treated candidates differently from candidates in other election areas. Clearly there was no “Illinois” way of handling elections in a fair way.

The convention's solution to all these problems was to create a State Board of Elections to oversee the voter registration and elections in the whole state. Although the delegates left the number, compensation and manner of selection of the Board members to the legislature, they specified that no political party could have a majority of members on the Board.

In 1973, after two years of bitter wrangling over these issues, the General Assembly passed a bill implementing this creation of a State Board of Elections. The Board was to have four members, each chosen, in a two-step process, by the Governor from a pair of nominees submitted by each of the four party leaders in the General Assembly.<sup>36</sup> From the beginning, the Board was in constant turmoil. Virtually every decision it made, even on the forms of ballots, created controversy and litigation.<sup>37</sup>

Two early decisions, *Lunding v. Walker*<sup>38</sup> and *Walker v. State Board of Elections*,<sup>39</sup> established the basic constitutional status of the Board. In *Lunding*, the precise question was whether the Governor could remove a member of the Board. Governor Walker, relying upon the decision in *Illinois State Education Association v. Walker*<sup>40</sup> that

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35. *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969) (holding that Powell had violated the delegates' constitutional rights).

36. The four “legislative leaders” are the Speaker and Minority Leader of the House and the President and Minority Leader of the Senate.

37. For a good history of the Board, see Bernardini, *The Illinois State Board of Elections: A History and Evaluation of the Formative Years*, 11 J. MAR. J. 321 (1977-78).

38. 65 Ill. 2d 516, 359 N.E.2d 96 (1976).

39. 65 Ill. 2d 543, 359 N.E.2d 113 (1976).

40. *Illinois State Educ. Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9, cert. denied, 419 U.S. 1058 (1974).



he had the power to require some employees responsible to him to file financial disclosure reports,<sup>41</sup> insisted that he could remove Lunding, a member of the Board, for failing to file such a report. The underlying issue in this dispute was whether the Board was part of the executive branch of state government.

After prolonged, complicated litigation, the Illinois Supreme Court held that, although the Governor had appointed members of the Board, thereby making them part of the executive branch, of which he is the head, he could not remove them at his sole discretion in the same way he could remove the members of ordinary agencies and boards. The Board of Elections, said the court, is a very special part of the executive branch—it is independent and non-partisan. Not even the Governor, the holder of “the supreme executive power,”<sup>42</sup> could remove a member of the Board unless he could show that there was a good cause for the removal.<sup>43</sup>

The court’s holding that the Board, although a unique, highly independent body, is a part of the executive branch was crucial to its consideration of the constitutionality of the two-step selection of Board members. In *Walker v. State Board of Elections*<sup>44</sup> the supreme court held that selection procedure unconstitutional. It pointed out that the constitution forbids the legislature, whose four leaders nominated the four pairs of people from whom the Governor appointed the four members of the Board, to “elect or appoint officers of the Executive Branch.”<sup>45</sup>

When one reads both cases, therefore, it is clear that the State Board of Elections is a part of the executive branch, but that it has a unique constitutional status which ought to protect its independence and integrity from encroachment by the members of both the executive and legislative branches. The General Assembly cannot take part in the selection of Board members, and the executive officer appointing them cannot remove them unless he can show a good reason for doing so.

In another section of *Walker*, the court invalidated the “tie-breaker” provision of the bill establishing the Board. This statutory provision allowed the Board to break a tie among its four members

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41. *Id.* at 530-31, 315 N.E.2d at 18-19.

42. ILL. CONST. art. V, §8.

43. Because the case was appealed from a temporary injunction issued by a circuit court, the Supreme Court did not reach the question whether Lunding’s failure to file a financial disclosure report was sufficient “cause” for discharge.

44. 65 Ill. 2d 543, 359 N.E.2d 113 (1976).

45. ILL. CONST. art. V, §9(a).



by having one member, to be chosen by lot, abstain from voting. The court said that the Board's decisions on elections, which affect the basic constitutional rights of every candidate and voter in Illinois, are too important to be left to "a lottery."

In January, 1978, the General Assembly passed another bill creating a new State Board of Elections.<sup>46</sup> The new Board has eight members. The Governor appoints two from members of his political party who live in Cook County and two from co-partisans who live outside Cook County. The next highest ranking state executive officer<sup>47</sup> who belongs to the major political party other than the Governor's nominates twelve members of his party, three for each of the four remaining positions. The Governor then appoints one of the three nominees for each post. This procedure is an attempt to insure a Board made up of four Democrats and four Republicans, selected from varied geographical and political areas, all appointed (at least technically) by the Governor.<sup>48</sup>

Even a decade later, we cannot tell whether this Board has succeeded. Certainly it is less controversial than its predecessor. In the few years of its existence, it has kept a very low profile and has attempted to handle only the day-by-day administrative tasks of supervising registration and elections. The county clerks and Boards of Election Commissioners remain powerful local election officials, for the Board does not seem to want to challenge their local hegemony.

The current political realities of Illinois are such that the Board could scarcely do otherwise. The breakdown of the Cook County Democratic Party, which began after Mayor Daley's death in 1976, has insured that local election squabbles are sent to the Circuit Court of Cook County for resolution. The Board does not play a significant adjudicative role, even as an administrative agency, in these disputes. If it investigated and prosecuted fraud and unfairness in local elections effectively, the Board would inevitably create enemies at the state and local levels. To withstand their attacks, the Board would have to have the confidence of the public and of governmental officers and candidates for office. As yet, the Board has not acquired this trust. Only if and when it does will we be able to judge its effectiveness. Until

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46. ILL. REV. STAT. ch. 46, para. 1A-1 (1978).

47. The rank of the state executive officers is Governor, Attorney General, Secretary of State, Comptroller and Treasurer. ILL. REV. STAT. ch. 46, §1A-3(2) (1987).

48. In 1978, Governor James R. Thompson appointed four Republicans. He also appointed four Democrats of the twelve nominated by Secretary of State Alan J. Dixon, the highest ranking non-Republican officer.

then, the partisan political process, criminal statutes, law enforcement officials and investigative reporters remain the true watchdogs of elections in Illinois, especially in Cook County.

Compared to the controversial 18-year-old vote and the State Board of Elections, the remaining provisions of Article III were relatively uncontroversial. Perhaps the most interesting of these sections is the automatic restoration of the right to vote upon the completion of a criminal sentence.<sup>49</sup> Formerly, only a gubernatorial pardon could restore suffrage to a convict. Although it is impossible to know whether ex-convicts have made use of their new right, the provision makes a public statement favoring rehabilitation. It is apparently still well ahead of its time, because the United States Supreme Court has held that there is no federal constitutional right to reenfranchisement after the completion of a penal sentence.<sup>50</sup> The Illinois Attorney General has advised that only people who are actually serving prison terms, including those on work release programs and those convicted of misdemeanors, are prohibited from voting; those serving sentences of "periodic imprisonment" or on conditional discharge, probation or parole may vote.<sup>51</sup>

A second change the convention made was only a few months ahead of federal law. The delegates decided that the former requirement of a year's residence in Illinois before one could vote<sup>52</sup> was unnecessarily long in an era when the average American moves at least every two years. They shortened the duration of residence the General Assembly could require to a maximum of six months and allowed the legislature to establish an even shorter period of durational residence.<sup>53</sup> The United States Supreme Court held just two years later that a state could not require a person to live in the state for longer than 30 days before he could vote.<sup>54</sup> Thus, the change in the Illinois requirement, which seemed quite radical, was conservative in comparison with United States Supreme Court standards.

Article III, Section 4 mandates the legislature to define "permanent residence for voting purposes" and requires laws on voter registration and elections to be "general and uniform." The phrase "permanent residence for voting purposes" is not easy to define.

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49. ILL. CONST. art. III, §2.

50. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

51. Op. Att'y. Gen. S-1056 (1976). See also ILL. REV. STAT. ch. 46, para. 3-5 (1987).

52. ILL. CONST. of 1870, art. VII, §1.

53. ILL. CONST. art. III, §1.

54. *Dunn v. Blumstein*, 405 U.S. 330 (1972).



After much controversy in the early 1970's, chiefly concerning undergraduates living in college dormitories, the Election Code seems to have settled upon "permanent abode"—which hardly disposes of the issue.<sup>55</sup>

The phrase "general and uniform" is also difficult to define. One court said that a "general law is one which includes all persons, classes and property similarly situated,"<sup>56</sup> language reminiscent of equal protection clauses and prohibitions of special legislation. The most important case on "general and uniform" is *Bridgewater v. Hotz*,<sup>57</sup> in which the Illinois Supreme Court virtually conceded that Article III, Section 4 is really an equal protection guarantee or ban on special legislation in registration and elections. Nonetheless, the supreme court upheld differences in primary dates based on the size of the counties in which the primary was to be held. The same court later held the Republican Party's decision to have a "blind" presidential primary, while the Democratic Party had a "presidential preference" primary,<sup>58</sup> did not violate this provision. Yet it also held that a 1986 attempt to change from a partisan to a non-partisan mayoral primary shortly before the Chicago mayoral election did violate the "general and uniform" clause.<sup>59</sup>

In short, registration of voters, primaries and elections in Illinois are still under both local and state control. As yet, Article III has had little impact upon the electoral process in Illinois. Decisions of the United States Supreme Court and changing partisan alliances have had at least as much influence upon the franchise and elections in the lives of most Illinoisans.

#### IV. INDIVIDUAL RIGHTS AND RESPONSIBILITIES

(Article I; Article XI; Article XIII, § 5; Separate Proposition 3)

When we speak of the rights of an individual, we usually mean his rights vis-a-vis the government—rights which the courts will enforce. The 1970 Constitution contains many provisions on individual rights, some of them traditional, some daringly new. Article I, the Bill of Rights, contains most of these provisions. In addition, Article

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55. ILL. REV. STAT. ch. 46, para.3-1 through 3-4 (1987).

56. *In re Worth-Palos Park Dist.*, 50 Ill. App. 3d 356, 358, 365 N.E.2d 565, 566 (1977).

57. 51 Ill. 2d 103, 281 N.E.2d 317 (1972).

58. *Totten v. State Board of Elections*, 79 Ill. 2d 288, 403 N.E.2d 225 (1980).

59. *Lipinski v. Chicago Board of Election Commissioners*, 114 Ill. 2d 95, 500 N.E.2d 39 (1986).

XI guarantees a clean, healthful environment, and Article XIII, Section 5 confers a contractual status on membership in public employee retirement plans and bars impairment of earned benefits. Separately Submitted Proposition 3 would have created a right not to be executed.

#### A. MISCELLANEOUS RIGHTS AND REMEDIES IN THE BILL OF RIGHTS

Taken together, the rights guaranteed by Article I logically fall into four distinct groups. The first group consists of the twelve sections of Article I that are virtually unchanged from the 1870 Constitution.<sup>60</sup> All concern individual "rights" except for Section 23, which contains a warning, really a "constitutional sermon," that the "blessings of liberty . . . cannot endure unless the people recognize their corresponding individual obligations and responsibilities." In short, both the 1870 and 1970 Constitutions recognized that citizens have duties as well as rights.

The second group consists of four miscellaneous provisions, three of which are completely new and one of which is a substantial revision of an 1870 provision. The revised section is Article I, Section 12, which declares that everyone "shall" find a remedy in the legal system for wrongs done to him. The 1870 provision stated simply that he "ought" to find a remedy. So far, this change in verb from the prescriptive to the imperative mode has not affected the courts. They have held, as they did under the 1870 Constitution, that the statement expresses only a political or jurisprudential philosophy.<sup>61</sup> Not surprisingly, therefore, the courts have refused to let plaintiffs use even the philosophy of this provision as the basis for creating a new cause of action, i.e., one unknown at the common law and not granted by statute.<sup>62</sup> Given these positions, it is a bit surprising that the courts seem to allow litigants to use the section as a "make-weight" to buttress their interpretation of an already established common law principle or already effective statute. Lawyers, therefore, can use

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60. ILL. CONST. art. I, §§1, 3, 4, 5, 8, 9, 10, 13, 15, 16, 21 and 23.

61. *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 367 F. Supp. 594, *rev'd on other grounds*, 505 F.2d 1141, *cert. denied*, 420 U.S. 997 (1973); *Sullivan v. Midlothian Park Dist.*, 51 Ill. 2d 274, 281 N.E.2d 659 (1972); *Costello v. Unarco Industries, Inc.*, 129 Ill. App. 3d 736, 473 N.E.2d 96 (1984).

62. *Favata v. Rosenberg*, 106 Ill. App. 3d 572, 436 N.E.2d 49 (1982); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); *Pantone v. Demos*, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978).



Article I, Section 12 to support their arguments, but only to a limited extent.<sup>63</sup>

The three new provisions in the second group of rights have not effected great changes either. Article I, Section 24, "Rights Retained," is in substance a restatement of the Ninth Amendment to the United States Constitution. It has had no impact on case law so far.

Article I, Sections 20 and 22 have been more controversial. Section 20, "Individual Dignity," declares, "[c]ommunications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group . . . by reference to religious, racial, ethnic, national or regional affiliation are condemned." Proposed by Victor A. Arrigo, a delegate sensitive to charges that Americans of Italian descent were "all Mafia," it was criticized at the convention as a well-intentioned effort that probably, but not certainly, is a violation of the First Amendment guarantee of Free Speech.<sup>64</sup> The one case interpreting this section holds only that it does not give a person the right to sue someone who has defamed a group to which he belongs.<sup>65</sup> During the American Nazi Party's attempt to march in Skokie in 1977, this section received some publicity, although it was not the basis of any of the litigation surrounding those attempts. More recently, Section 20 may have been one of the inspirations for the 1983 Act making "ethnic intimidation" a misdemeanor.<sup>66</sup> Since this Act makes actions—"assault, criminal trespass to land, or mob action"—the offenses, as opposed to statements, it is probably constitutional. Article I, Section 20 may be only a "constitutional sermon," but it has apparently helped foster the social and political climate necessary for passage of such bills.

Section 22, purporting to give "the individual citizen" a "right . . . to keep and bear arms . . .," has engendered the most litigation. Although the supporters of the section apparently thought it a ban on gun control laws, the three cases on it to date clearly validated gun control statutes and ordinances.<sup>67</sup> Two of the cases<sup>68</sup> arose from

63. See, e.g., *Crocker v. Finley*, 99 Ill. 2d 444, 459 N.E.2d 1346 (1984) ("right to obtain justice by law freely"); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979).

64. The absence of certainty of Section 20's unconstitutionality arises from the United States Supreme Court's upholding of an Illinois statute similar to Section 20 in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The wording of the statute, repealed before 1969, was the apparent genesis of Section 20.

65. *Irving v. J. L. Marsh, Inc.*, 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977).

66. ILL. REV. STAT., ch. 38, para.12-7.1 (1987).

67. *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 470 N.E.2d 266

a Morton Grove village ordinance prohibiting possession of "hand-guns," not all "arms," by those who were not peace officers, military personnel or licensed gun collectors, but allowing recreational use at gun clubs. The ordinance attracted national publicity, much of it emotional, but both state and federal courts upheld it under both Article I, Section 22 and the Second Amendment to the United States Constitution.

#### B. CRIMINAL JUSTICE PROVISIONS IN THE BILL OF RIGHTS

The third group of rights consists of the four potentially significant changes in criminal justice. The first two concern pre-trial rights. Article I, Section 6 addresses the search and seizure problems that the Fourth Amendment to the United States Constitution also addresses. The most important aspect of the section is that it creates a specific right to privacy. In contrast, the United States Constitution does not specifically declare an individual right to privacy, but cases construing the first, third, fourth, fifth and ninth amendments have cumulatively created that right.<sup>69</sup> As the governmental ethics cases discussed previously indicate,<sup>70</sup> the government's need to make certain information public may conflict with an individual's right to keep personal matters private. Since the Illinois Supreme Court has held that Section 6, despite the inclusion of a specific right to privacy, is no more extensive than the right to privacy implicit in the United States Constitution,<sup>71</sup> it seems useless, at least for now, to consider how the Illinois Constitution might afford its citizens greater protection from governmental intrusion than the federal right does.

The unsettled issue of Article I, Section 6 is whether it protects people only from governmental intrusions into their privacy or from intrusions by private persons as well. Presumably, the answer is "no", but it is not a simple answer. The requirement of "state action" by a defendant before the plaintiff can raise his right to privacy is not an easy requirement to define. If state action is truly absent, however, there is neither a federal nor a state right to privacy.<sup>72</sup>

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(1984); *Quilici v. Morton Grove*, 532 F. Supp. 1169, *aff'd* 695 F.2d 261, *cert. denied*, 464 U.S. 863 (1983); *People v. Williams*, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978).

68. *Kalodimos*, 103 Ill. 2d 483, 470 N.E.2d 266; *Quilici*, 532 F. Supp. 1169.

69. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. *See supra* text accompanying notes 27-33.

71. *People v. Tisler*, 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

72. *People v. Burton*, 131 Ill. App. 3d 153, 475 N.E.2d 583 (1985) is the most recent Illinois case on this issue.



The other potentially significant change in pre-trial criminal justice is the inauguration of the use of a judge's finding of "probable cause" at a preliminary hearing as an alternative to an indictment by a grand jury. The grand jury is an ancient Anglo-American institution by which the prosecutor presents evidence for his case against a defendant before several citizens, who may then vote to indict the defendant. If they do not indict the defendant, the prosecutor cannot bring the defendant to trial. Although the grand jury was originally devised to protect a defendant from unwarranted prosecution, it has evolved into a rubber stamp for any prosecutor who really wants to indict a defendant and a convenient excuse for failing to indict a person whom the prosecutor does not really want to indict.<sup>73</sup>

Section 7 of Article I allows the General Assembly to limit or abolish the use of a grand jury. It also provides, for the first time in Illinois, an alternative to a grand jury indictment: a finding of probable cause by a judge in a preliminary hearing. The courts have not successfully defined "prompt;" indeed, they have refused to grant judicial relief to a defendant held too long a time, claiming that the power to afford such relief resides solely in the legislature.<sup>74</sup> The legislature responded to these cases by allowing dismissal of a case against a defendant who has not had a preliminary hearing or been indicted by a grand jury within thirty days after being taken into custody.<sup>75</sup>

The Illinois Supreme Court has settled the major question about the preliminary hearing: whether a prosecutor who has failed to obtain a finding of probable cause at a preliminary hearing may then try to obtain an indictment from a grand jury. The court said that the prosecutor could indeed try again, this time before a grand jury, because the defendant had only the right either to an indictment or to a finding of probable cause, at the prosecutor's option.<sup>76</sup> To date, the legislature and the courts have allowed grand juries and preliminary hearings to co-exist without regulating when each method can

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73. RECORD OF PROCEEDINGS, *supra* note 2, Vol. III. at 1465-66 (remarks of Delegate Raby); Duff & Harrison, *The Grand Jury in Illinois: To Slaughter a Sacred Cow*, 1973 U. ILL. L. FORUM 635, 642-43.

74. Cases refusing judicial relief include *People v. Riddle*, 141 Ill. App. 3d 97, 489 N.E.2d 1176 (1986); *People v. Anderson*, 92 Ill. App. 3d 849, 416 N.E.2d 78 (1981); and *People v. Sanders*, 36 Ill. App. 3d 518, 344 N.E.2d 479 (1976). Cases holding that relief lies solely within the legislative power include *People v. Kilgore*, 39 Ill. App. 3d 1000, 350 N.E.2d 810 (1976), and *People v. Todd*, 34 Ill. App. 3d 844, 340 N.E.2d 669 (1976).

75. ILL. REV. STAT. ch. 38, para. 109-3.1(b) (1975).

76. *People v. Kent*, 54 Ill. 2d 161, 295 N.E.2d 710 (1972).

be used. The need for efficiency in criminal courts will probably force a reconciliation between the two systems.

Two other significant provisions on criminal law concern post-trial criminal matters. Article I, Section 11 contains language essentially the same as its predecessor,<sup>77</sup> which required that penalties be determined "according to the seriousness of the offense." It also contains new language adding that the penalties be determined "with the objective of restoring the offender to useful citizenship." The addition of rehabilitation as a purpose of sentencing has not caused a revolution in criminal law, but it has had a definite effect on the courts. The courts have suggested, however, that the sentencing judge must "look at the circumstances attending the offense,"<sup>78</sup> and that he "may not resign to total retribution one who has a chance of future restoration to useful citizenship in a free society."<sup>79</sup> This section applies both to the General Assembly in establishing penalties for crimes and to judges in imposing sentence.<sup>80</sup> Courts have been reluctant to upset legislative determinations of minimum and maximum sentences or to reduce a sentence imposed by a trial court judge. Of more than a hundred cases raising these issues on appeal, few have resulted in reductions of sentences. In those few cases the particular defendant usually was a very young first offender.<sup>81</sup>

The death penalty was an emotional focal point of the convention, which met before the recent federal court challenges to the death penalty. Because the differences between the proponents and opponents on this issue were irreconcilable, the delegates submitted the question as a separately submitted side-issue at the constitutional referendum. Although the anti-capital punishment movement was relatively strong in 1970, the voters rejected Proposition 3, the abolition of the death penalty, by a two-to-one margin. Since then, United States Supreme Court decisions have greatly restricted, although never abolished, the use of the death penalty.<sup>82</sup> Illinois has reinstated the death penalty for certain crimes, and it seems that Illinois will continue to have capital punishment on the books for a

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77. ILL. CONST. of 1870, art. II, §11.

78. *People v. Carmickle*, 46 Ill. App. 3d 112, 115, 360 N.E.2d 794, 797 (1977).

79. *People v. Gibbs*, 49 Ill. App. 3d 644, 648, 364 N.E.2d 491, 494 (1977).

80. *People v. Taylor*, 102 Ill. 2d 201, 464 N.E.2d 1059 (1984).

81. *See, e.g., People v. Williams*, 62 Ill. App. 3d 966, 379 N.E.2d 1268 (1978); *People v. Horton*, 43 Ill. App. 3d 150, 356 N.E.2d 1044 (1977); *People v. Wilkins*, 36 Ill. App. 3d 761, 344 N.E.2d 724 (1976); *People v. Brown*, 27 Ill. App. 3d 405, 327 N.E.2d 75 (1975), all involving young defendants with no adult convictions.

82. *See Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny.



long time to come.<sup>83</sup> The Illinois Supreme Court retained its constitutional duty of hearing appeals from a death sentence directly from the circuit court trial (Art.VI, § 4(b)). The final noteworthy new provision on criminal justice is Article I, Section 14, "Imprisonment for Debt." Although the first sentence of this section, forbidding imprisonment for debt except in cases of fraud or refusal to pay, is only a modernization of its 1870 predecessor,<sup>84</sup> the second sentence is new. It prohibits the imprisonment of a criminal defendant for failure to pay a fine assessed in a criminal prosecution "unless he has been afforded adequate time to make payments, in installments if necessary, and has willfully failed" to pay. The purpose of this section was to remove the discrimination between the rich and the poor in the rare instance when a judge imposes a substantial criminal fine. At first, the trial courts implemented this provision informally by simply granting a stay of execution of the sentence pending the defendant's payment of the fine on an installment plan set by the court. Later, the General Assembly specifically authorized the court to order a fine to be paid in installments.<sup>85</sup>

Article I, Section 14, is another provision which anticipated the United States Supreme Court by only a few months, since in 1972 the Court held that an indigent criminal defendant could not be imprisoned for non-payment of a fine unless he had willfully refused to pay it.<sup>86</sup> The Illinois courts have followed the federal decision and Article I, Section 14, without complaint or controversy. In fact, one Illinois Appellate Court has extended both Article I, Section 14 and another United States Supreme Court decision to apply the same rule to defendants who willfully fail to pay the costs and fees of their prosecution imposed by the costs statute.<sup>87</sup>

### C. THE ANTI-DISCRIMINATION PROVISIONS IN THE BILL OF RIGHTS

The final category in the Bill of Rights is also the most novel: the civil rights provisions. These are the three new anti-discrimination sections and the due process equal protection clause.

The 1870 Constitution had guaranteed due process of law, but not equal protection of the laws.<sup>88</sup> The delegates quickly remedied that by adding a standard equal protection clause to the new consti-

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83. ILL. REV. STAT. ch. 38, para. 9-1 (1987).

84. ILL. CONST. of 1870, art. II, §12.

85. ILL. REV. STAT. ch. 38, para.1005-9-1(e) (1985).

86. *See Tate v. Short*, 401 U.S. 395 (1971).

87. *People v. Nicholls*, 45 Ill. App. 3d 312, 359 N.E.2d 1095 (1977).

88. ILL. CONST. of 1870, art. II, §2.

tution.<sup>89</sup> Although an equal protection clause is the traditional means of preventing discrimination, particularly racial discrimination by the "state," meaning any government, the delegates decided that three additional provisions, each attacking discrimination in its own way, were necessary reinforcements of the principle of equality. The most important of these is Article I, Section 17, which prohibits discrimination based upon "race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property." The delegates chose to attack only employment and property discrimination primarily because jobs and housing are the two most critical needs of racial, religious and ethnic minorities.

A mere glance at the section shows why some observers originally called it the broadest civil rights provision in any state constitution.<sup>90</sup> It provides that the right to be free of discrimination is not limited to the public sector, but extends to private employment and private property as well. There are no exemptions from this broad grant except for those "reasonable exemptions" the General Assembly may set. The rights are self-executing, i.e., not dependent upon legislative action, but the General Assembly may add remedies to those usually given by a court.

For the first few years after the constitution became effective, no one petitioned a court for a remedy under Article I, Section 17. Finally, two noteworthy cases arose. In *Walinski v. Morrison*,<sup>91</sup> the plaintiff alleged discrimination by a private party. She sought damages from an accounting firm that had refused to hire her, allegedly because of her sex. The Illinois Appellate Court held that Article I, Section 17 created a private right of action, allowing a victim of discrimination to obtain any damages a civil court could grant, including money damages, instead of having to proceed through an administrative process.

In the other case, *Davis v. Attic Club*,<sup>92</sup> one man and several women contended that the businessmen's clubs in downtown Chicago violated Article I, Section 17 by selling "property"—liquor and food—to a membership whose ranks were not open to women. Over a strong dissent, the majority of the Illinois Appellate Court held that the clubs had not violated the constitution. The case held that, although food and liquor are "property" for purposes of Article I,

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89. ILL. CONST. art. I, §2.

90. See, e.g., E. GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 155-71 (1972).

91. 60 Ill. App. 3d 616, 377 N.E.2d 242 (1970).

92. 56 Ill. App. 3d 58, 371 N.E.2d 903 (1977).



Section 17, the General Assembly had created a permissible "reasonable exemption" for "private clubs," including businessmen's clubs. It also held that the clubs' membership policies were protected by the right of privacy contained in Article I, Section 6.

Although the Illinois Supreme Court refused to hear the plaintiff's appeal, the case attracted much attention for two reasons. First, the Appellate Court's extension of the right of privacy beyond that established by the marital and sexual privacy cases decided by the United States Supreme Court<sup>93</sup> and the economic disclosure cases decided by the Illinois Supreme Court<sup>94</sup> establishes the superiority of one constitutional right, a broadly-defined right of privacy, over another constitutional right, the right to be free of discrimination. Second, the court said that the legislature had created a "reasonable exemption" in 1949 when it had passed a bill concerning the sale of alcoholic beverages. This seems wrong because the General Assembly sitting in 1949 obviously could not have been creating an exemption to a constitution drafted in 1970. Nobody knows how many other statutes passed years ago can now be considered retroactive "exemptions" to Article I, Section 17 or indeed any other part of the constitution.

The private club issue smoldered for a decade. Most of the one-sex clubs, at least in downtown Chicago, changed their rules under strong pressure from women's groups. In 1987, shortly after the United States Supreme Court held that a state statute could prohibit the "men only" rule of Rotary International,<sup>95</sup> the Chicago City Council passed an ordinance that effectively prohibited the clubs from excluding women. In Chicago, at least, the fires of this issue apparently have died out.

In the early 1980's, Article I, Section 17, along with Section 19, faced a threat greater than "privacy" and "anticipatory exemption." In 1979, the General Assembly passed the Illinois Human Rights Act.<sup>96</sup> It replaced the Fair Employment Practices Commission with a state commission to hear charges of discrimination by, among others,

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93. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

94. *Buettell v. Walker*, 59 Ill. 2d 146, 319 N.E.2d 502 (1974); *Illinois State Employees' Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9 (1974); *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972). *See also supra* text accompanying notes 27-29.

95. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987).

96. ILL. REV. STAT. ch. 68, para. 1-101, *et seq.*

private employers, sellers of real estate and landlords. In a series of cases beginning with *Thakkar v. Wilson Enterprises*,<sup>97</sup> the courts required grievants to exhaust their remedies before the Human Rights Commission before they could bring an action in court. The foundation for this conclusion is the language of Article I, Section 17, allowing the creation of "exemptions" and the court's finding that the Human Rights Act makes just such an exemption by establishing the jurisdiction of the Human Rights Commission.

The federal courts have extended the ramifications of these decisions by prohibiting Illinoisans from bringing federal suits on employment discrimination until they have exhausted their administrative remedies.<sup>98</sup> The effect of the state and federal decisions is to deprive Illinois employees of a cause of action unless they are willing to continue a lawsuit after receiving a decision from a state agency whose backlog is years old.

In effect, then, there is no longer a constitutional remedy against employment discrimination in Illinois. It is hard to escape the conclusion that the courts have eviscerated Article I, Section 17 and imposed a situation intended by neither the convention nor the General Assembly—and that the General Assembly has been remiss in taking steps to amend the statutes to reverse these decisions. Indeed, the text of the Illinois Human Rights Act says specifically that one of its purposes is to implement Sections 17, 18 and 19 of Article I; nothing in the text suggests an intent to create an exemption.<sup>99</sup> Since the courts' interpretation is now "settled law," any advocate asserting that the constitution does not allow the creation of such an "exemption" would invite sanctions for filing frivolous pleadings.<sup>100</sup>

The second of the three new anti-discrimination provisions is Article I, Section 18. Cast almost in the words of the standard equal protection clause and of the proposed Equal Rights Amendment, the section seeks to prohibit sex discrimination "by the State or its units of local government and school districts." As the convention debates clearly show, the delegates intended this section to make sex a "suspect classification."<sup>101</sup> This means that if a law treats males and females

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97. 120 Ill. App. 3d 878, 458 N.E.2d 985 (1983).

98. The most recent cases are *Sanders v. A. J. Canfield Co.*, 635 F. Supp. 85 (N.D. Ill. 1986) and *Walker v. Woodward Governor Co.*, 631 F. Supp. 91 (N.D. Ill. 1986).

99. ILL. REV. STAT. ch. 68, para.1-102(c) (1987).

100. ILL. REV. STAT. ch. 110, para.2-611 (1987); FED. R. CIV. P. Rule 11. There is language in *Sanders*, 635 F. Supp. 85 (N.D. Ill. 1986), suggesting precisely that.

101. RECORD OF PROCEEDINGS, *supra* note 2, Vol. V at 3669 (remarks of Delegate Nicholson).



differently, the legislature must prove to the court that there is a compelling reason for the law to treat them differently. If sex were not a "suspect classification," the person being discriminated against would have to prove that the distinction drawn between males and females was improper. This difference in who bears this burden of proving inequality is crucial to many equal protection decisions.

The first Illinois Supreme Court case on Article I, Section 18 was *People v. Ellis*,<sup>102</sup> in which a 17-year-old boy claimed that the statute on criminal trials of juveniles was unconstitutional. The Act said that females under 18 years old and males under 17 years old were to be tried as juveniles, rather than as adults. Ellis claimed that being tried in juvenile court was more favorable to a defendant's case than being tried in adult court. The supreme court agreed and said the Act violated Article I, Section 18. Most important, it held that the section made sex a "suspect classification." Because the state could not show that it had a compelling reason for distinguishing between males and females for the trial of juvenile offenses, the court said that the sexes had to be treated equally for this purpose.

The cases on Article I, Section 18, show that it can be a powerful tool to invalidate governmentally-related sex discrimination, but that it does not automatically invalidate classifications based on sex. Under the "compelling state interest" test, not every classification by sex is unconstitutional. For example, the Illinois courts struggled with the incest statutes, which until 1977 imposed a heavier penalty upon a father who had sexual relations with his daughter than upon a mother who had sexual relation with her son.<sup>103</sup> The Illinois Supreme Court refused to decide whether the incest statute was a "sex-based classification," but it has held that even if the statute had created a sex classification, the state could impose a heavier penalty on the fathers, because their action can result in pregnancy, whereas the actions of the mothers cannot.<sup>104</sup>

Curiously, although many observers regard both Section 18 and its close relative, the Equal Rights Amendment, as "women's rights provisions," none of the early Section 18 cases in Illinois involved discrimination against women. All of the early plaintiffs were men.<sup>105</sup>

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102. 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

103. ILL. REV. STAT. ch. 38, para.11-10, 2-7 (1977). See also, Linton, *Sex Discrimination Under Article I, Section 18 of the 1970 Illinois Constitution*, 66 ILL. BAR. J. 450 (1978). The legislature equalized the penalties in 1977, ILL. REV. STAT. ch. 38, para. 11-10 (1977).

104. *People v. Boyer*, 63 Ill. 2d 433, 349 N.E.2d 50 (1976).

105. See Linton, *supra* note 101.

One reason for this is that, although about 75% of the Illinois statutes that might have been found to be discriminatory under Section 18 discriminated against women, the legislature has amended most of those statutes since 1971 to conform to the requirements of the new constitution. Thus, one result of Section 18 has been to reduce litigation. The female plaintiffs to date have not been particularly successful,<sup>106</sup> and if the state and federal courts require them to exhaust their remedies before the Human Rights Commission, they will have even fewer chances of success.

The last of the three anti-discrimination sections, Article I, Section 19, prohibits discrimination against the mentally or physically handicapped in the sale or rental of property and "discrimination unrelated to ability in the hiring and promotion practices of any employer." Just as Article I, Section 18 is really a specialized form of the Equal Protection Clause, so Article I, Section 19 is really a specialized form of the anti-discrimination provision of Article I, Section 17. It applies only to the sale or rental of property and to employment, because the handicapped face more obstacles from discrimination in those areas than in others.

Article I, Section 19 has suffered the same fate as Article I, Section 17. Beginning with *Advocates for the Handicapped v. Sears, Roebuck*,<sup>107</sup> there have been several cases defining "handicapped" and "hiring and promotion practices" and several dealing with the exhaustion of administrative remedies issues presented by the Illinois Human Rights Act. Amputation of a leg is a handicap,<sup>108</sup> while uterine cancer<sup>109</sup> and kidney transplants preventing lifting heavy weights<sup>110</sup> are not. One Appellate Court has declined to define "hiring and promotion practices" broadly, holding that the phrase does not include being discharged from a job.<sup>111</sup> As a result, an employer is required to hire a handicapped person, but he may fire the handicapped person with impunity.

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106. See, e.g., *O'Connor v. Board of Education*, 645 F.2d 578 (7th Cir. 1981), cert. denied, 454 U.S. 1084 (1981), on remand, 545 F. Supp. 376 (N.D. Ill. 1982); *Petrie v. Illinois High School Ass'n*, 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979).

107. 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), cert. denied, 444 U.S. 981 (1979).

108. *Melvin v. City of West Frankfort*, 93 Ill. App. 3d 425, 417 N.E.2d 260 (1981).

109. *Lyons v. Heritage House Restaurants, Inc.*, 89 Ill. 2d 163, 432 N.E.2d 270 (1982).

110. *Advocates for the Handicapped v. Sears, Roebuck & Co.*, 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), cert. denied, 444 U.S. 981 (1979).

111. *Yount v. Hesston Corp.*, 124 Ill. App. 3d 943, 464 N.E.2d 1214 (1984).



These cases, which many advocates for the handicapped would say result in a setback for the rights of disabled persons, pale beside the cases holding that persons bringing actions under Section 19, like those bringing actions under Section 17, must exhaust their remedies before the Illinois Human Rights Commission before seeking relief in either state or federal court.<sup>112</sup>

As a result of these recent cases, Article I, Section 19, is, like Article I, Section 17, a toothless tiger. These two provisions, on their face the strongest constitutional protections against private discrimination in the country, have been consigned to a state agency that cannot adequately process charges. Perhaps Article I, Section 18 will also be relegated there. The courts and the legislature have failed. Until the General Assembly amends the Illinois Human Rights Act to prevent any judicial construction favoring an "exemption," these sections will remain unfulfilled dreams.<sup>113</sup>

#### D. PENSION RIGHTS

Aside from the Bill of Rights, two other constitutional provisions grant Illinois citizens novel and potentially significant rights. One is Article XIII, Section 5, "Pension and Retirement Rights," which makes membership in a public pension system "an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." This is a specialized form of Article I, Section 16, the traditional ban on governmental impairment of contracts. Article XIII, Section 5 was a response to public employees' fears that, because the General Assembly had not appropriated sufficient money for pension funds, there would not be enough money to pay the pensions when they became due.

One case held that the provision does not require the state to appropriate funds to maintain a specific level of support for a public retirement system,<sup>114</sup> a decision that does not bode well for the concept of sufficient funding.

The most significant cases on Article XIII, Section 5 have arisen in a very different context. A few cases have considered the effect of

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112. *Id.*

113. I say this even though many of the members of the convention apparently disagree with me. When many of the living delegates "reconvened" on September 17-19, 1987, those present and voting refused to adopt a resolution saying that the convention had not "intended" the "reasonable exemption" language to include an exhaustion of remedies requirement, such as the one in effect now.

114. *People ex rel. Illinois Federation of Teachers, A.F.T., AFL-CIO v. Lindberg*, 60 Ill. 2d 266, 326 N.E.2d 749 (1975), *cert. denied*, 423 U.S. 839 (1975).



the section upon changes in pension laws and ordinances, for example those concerning mandatory retirement. The cases, particularly concerning changes in retirement regulations and benefits, are mixed.<sup>115</sup>

One important case wrestled with the issue of what conditions, if any, the legislature may place upon a public employee's conduct before he can receive his pension. A state statute removed pension benefits from any public official who was convicted of a felony arising out of his employment, although it allowed him to recover the money he had paid into the pension system.<sup>116</sup> Otto Kerner, who was convicted of a federal felony for acts arising out of his position as Governor of Illinois, lost his pension rights by operation of this statute. The Illinois Supreme Court held that the statute did not "impair" his contractual right to a pension in violation of Article XIII, Section 5, because that provision did not preclude the state's setting reasonable conditions upon the exercise of an employee's pension rights. It found that the completion of public service without committing acts resulting in a conviction for a service-related felony was just such a reasonable condition.<sup>117</sup>

#### E. RIGHT TO HEALTHFUL ENVIRONMENT

The last provision granting a new right is Article XI— "Environment." Section One of this article establishes the provision and maintenance of "a healthful environment" as the "public policy of the State and the duty of each person." Section Two gives each person "the right to a healthful environment," and allows him to enforce this right in court, subject to any reasonable regulations the legislature may provide.

Although few plaintiffs have brought actions even tangentially related to environmental protection, and those have been unsuccessful,<sup>118</sup> no court has required exhaustion of remedies before a state agency before filing a complaint. Presumably, therefore, a plaintiff who can prove he has been injured by a polluter can still bring a civil suit for money damages or for an injunction compelling the defendant

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115. Compare *Peifer v. Board of Trustees*, 35 Ill. App. 3d 383, 342 N.E.2d 131 (1976) (violation of rights) with *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974) (no violation).

116. ILL. REV. STAT. ch. 108§, para. 14-149 (1977).

117. *Kerner v. State Employees' Retirement System*, 53 Ill. App. 3d 747, 368 N.E.2d 1118 (1977).

118. E.g., *Scattering Fork Drainage Dist. v. Ogilvie*, 19 Ill. App. 3d 386, 311 N.E.2d 203 (1974).



to stop polluting. Eventually, this right could lead to lawsuits and sanctions against polluters.

Article XI cannot be understood without reading the Illinois Environmental Protection Act<sup>119</sup> as well. The General Assembly debated and passed this Act in the spring of 1970, exactly when the convention was discussing Article XI. Each body was aware of the other's actions. A state agency, the Environmental Protection Agency, may file complaints against polluters before the Pollution Control Board; individual citizens may also file complaints. The Board can assess penalties and issue cease and desist orders, although it cannot award damages, and, of course, its actions are reviewable by the judiciary. In a very real sense, then, the Environmental Protection Act was a "concurrent implementation" of Article XI.

In summary, we could divide the provisions within the Bill of Rights, the Environment Article and the pension rights provisions into two very broad categories: the traditional rights and the new rights. So far, there have been no surprising court decisions on the traditional rights. The novel rights, particularly those combatting discrimination and pollution, are striking, even daring, in their potential. They could become extremely useful tools for social change in the next decades. The lack of will and imagination on the part of plaintiffs' lawyers, the legislature and the courts has made it doubtful, however, whether the new rights will ever fulfill their potential.

## V. THE POLITICAL BRANCHES OF STATE GOVERNMENT

(Articles IV, V and XII; Separate Proposition 1)

The government of Illinois, like that of every American state, consists of three branches, each patterned on the corresponding branch of the federal government. The legislative and executive branches are commonly called the "political" branches because their chief officers are elected by the people and are thus responsible to them through the elective political process and because these two branches can initiate policy and make laws.

### A. THE STRUCTURE OF THE GENERAL ASSEMBLY

The Illinois General Assembly is a traditional bi-cameral body consisting of a Senate and a House of Representatives. In 1971, it was remarkable for two features. One was its size. The House, with

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119. ILL. REV. STAT. ch. 111§, para. 1001-1052 (1985).



177 members, was the fourth-largest lower chamber in any state legislature, and the Senate, with 59 members, was the second-largest upper chamber.

The other distinctive feature was the manner of election of the House. Three representatives were elected from each district; each voter could cast up to three votes for any one of the candidates for the three seats. By 1969 the multi-member district/cumulative voting system was the subject of fierce debate in and out of the convention.<sup>120</sup> The convention's solution to the debate was to place the issue, whether to replace the cumulative voting system with the more common "one member per district" method, before the people as a separate question. In effect, it let the people choose the system they wanted. The voters had more difficulty understanding this complex question than they did understanding the issues of allowing 18-year-olds to vote, abolishing the death penalty and selecting judges. The question attracted less attention than the other three did, except among politicians, especially legislators. In 1970, the people voted to retain a modified form of the multimember district/cumulative voting system.

In 1974, several groups organized into a coalition called the Committee for Legislative Reform tried to place the issue in question once again. They did not obtain enough signatures on their petitions to meet the requirements of Article XIV, Section 3 for an initiative and referendum attempt to amend the constitution. But this is precisely the type of constitutional issue for which the delegates drafted Article XIV, Section 3. The alternative method of constitutional amendment, legislative submission of the amendment to the electorate for ratification, would never succeed: the House would so strongly oppose the change (because it would make their own re-election more difficult) that the legislature would not be able to muster the three-fifths-of-each-house majority required.

In 1980, another coalition, this time led by the Coalition for Political Honesty, succeeded in placing this issue, along with the issue of a reduction in the size of the House, before the voters. The voters approved the amendment, and in 1981, the General Assembly redistricted on the basis of both the 1980 Federal Census and the 1980 Cutback Amendment. The Senate still has 59 members, but the House has only 118.

#### B. MAJOR CHANGES IN THE LEGISLATIVE PROCESS

Of the half-dozen or so major changes in the legislative process wrought by the constitution in 1970, none had as immediate an impact

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120. See *supra* discussion at text surrounding note 14.



as the reapportionment provision, Article IV, Section 3. According to this provision, the General Assembly must redistrict itself in the year following each Federal Decennial Census. If it cannot agree upon a reapportionment map, each of the four party leaders of the legislature (Speaker of the House, Minority Leader of the House, President of the Senate and Minority Leader of the Senate) appoints one legislator and one non-legislator to form an eight-member redistricting commission. The commission then tries to find an acceptable compromise map.

This provision had its baptism by fire in 1971, when the legislature had the first opportunity to redistrict itself. Three of the four leaders appointed themselves and one of their legislative aides to the commission. The fourth, who was too ill to serve, appointed his party's leader in his absence and a former Governor. In *People ex rel. Scott v. Grivetti*,<sup>121</sup> the Illinois Supreme Court held that the three leaders should not have appointed themselves as "legislative members," because that is not a true "appointment," or their aides as "public members," because the intent of the delegates in framing the provision had been to include the views of "the public" in the legislative redistricting process. The aides, quite predictably, had simply voted with their bosses on the commission. Since the court granted the invalidly-created map provisional validity, and the General Assembly simply passed the same map after the 1972 election, the only practical effect of *Grivetti* was to warn future legislative leaders of what they could not do in appointing members of redistricting commissions.

In 1981, the General Assembly was unable to redistrict itself again. The resulting commission consisted of four incumbent legislators and four people not currently connected with the legislature.<sup>122</sup> When they deadlocked, the lottery tie-breaker on August 10th made former Governor Samuel H. Shapiro, a Democrat, the ninth member of the commission. Predictably, the result was called "the Democratic map," although members of both parties objected to certain new districts, partly because some of the legislative districts (more so than senatorial districts) were not "compact and contiguous." The inevitable litigation on state and federal grounds resulted in a modified plan for the rest of the decade.<sup>123</sup>

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121. 50 Ill. 2d 156, 277 N.E.2d 881, *cert. denied*, 407 U.S. 921 (1972).

122. Senator James Phillip, Senator James H. Donnewald, Rep. Arthur Telser and Rep. Michael McClain were the "legislative members;" James Skelton, Robert Casey, Corneal Davis and Martin Murphy were the "public members," although the four non-legislators obviously had political connections and leanings.

123. *Schrage v. State Board of Elections*, 88 Ill. 2d 87, 430 N.E.2d 483 (1981);



The second important change brought about by the new constitution was the removal of the Lieutenant-Governor from the Presidency of the Senate, i.e., the position of presiding officer. At the state level, the Lieutenant-Governor, like the Vice-President of the United States at the federal level, is traditionally the presiding officer of the Senate. That position has created problems for each Senate since Vice-President John Adams, because the executive authority of any legislative chamber consists both of parliamentary power and political power. In every House of Representatives, both powers are united in one person, the Speaker. In the traditional Senate, however, the parliamentary power resides in the Vice-President or Lieutenant-Governor, and the political power vests with the President Pro Tem of the Senate, the leader of the majority party. If the parliamentary officer does not belong to the majority party of the chamber, the situation can be very tense.

Even in the best of situations, when the Vice-President or Lieutenant-Governor belongs to the party having the majority of the Senate, the normal tension between the legislative and executive branches causes suspicion between the members of the Senate and its presiding officer, a member of the executive branch. As a result, the Vice-President rarely in fact presides over the United States Senate; he confines himself to being "the President's man" and breaker of tie votes. When the Illinois Senate elected its first president in 1973, every senator approved the emancipation of the Senate from the last vestige of control by a member of the executive branch.

The third major change in the legislative process was the imposition of a requirement that the General Assembly keep a transcript of its debates as well as a journal of its proceedings.<sup>124</sup> The transcript, which is made from voice-activated electronic tapes, is sometimes useful in determining the intent of the legislature in passing bills. The transcripts and journals are available in major law libraries around the state and in the state archives. The impact of this requirement upon the legislature itself is uncertain, but some lawyers use the debates in litigating new statutes.

Fourth, the new Constitution substitutes the "enrolled bill rule" for the "journal entry rule." Under the 1870 Constitution, the courts could examine the journal of each house for evidence that the legislature had complied with all of the constitutional procedural

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Rybicki v. State Board of Elections, 574 F. Supp. 1082, *supplemented* 574 F. Supp. 1147, 1161 (N.D. Ill. 1982).

124. ILL. CONST. art. IV, para. 7(b).



requirements for passage of a bill. If the legislature had failed to record compliance in its journals, the courts could invalidate the bill. This journal entry rule resulted in much litigation over purely technical flaws alleged to be in a bill. Article IV, Section 8 of the 1970 Constitution sets forth the procedure for bill passage and then establishes a rule forbidding the court to look at anything but the final printed bill (called the "enrolled bill") to see whether the legislature had complied with the technical requirements of the constitution. So far, the Illinois Supreme Court, accordingly, has refused to look beyond the final bill itself.<sup>125</sup> This view differs from the journal entry rule, by which the journal creates a presumption that the constitutional requirements were followed, a presumption that may be rebutted by clear and convincing evidence to the contrary.<sup>126</sup>

The remaining two major changes have caused considerable difficulty. Article IV, Section 10 requires the General Assembly to establish a set date upon which laws become effective. It also requires a three-fifths vote of each house to pass any bill between July 1st and December 31st of each year if the bill is to become effective before July 1st of the following year. The purpose of the first requirement is to give the public notice that laws are about to become effective. The purpose of the second is to encourage the General Assembly to conclude its legislative business by July 1st of each year.

Since 1971, about two-thirds of all bills have in fact become effective on one date, so the purpose of the uniform effective date requirement apparently has been fulfilled. The three-fifths majority vote requirement, however, has become counter-productive, because it has allowed a minority bloc (albeit 41%, a substantial minority) in either house to prevent the passage of a bill the majority wants to become effective before July 1st of the next year. That bloc needs only to prolong the legislative session beyond June 30th, and it will be in a superior bargaining position to obtain compromises on the bill. In short, in their zeal to insure a firm end to the Spring legislative session, the delegates created a mechanism for prolonging the session into July.<sup>127</sup>

A further complication arises from the effect of the Governor's vetos upon the effective date of a bill. The new gubernatorial power

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125. See, e.g., *Fuehrmeyer v. Chicago*, 57 Ill. 2d 193, 311 N.E.2d 116 (1974).

126. *Yarger v. Board of Regents*, 98 Ill. 2d 259, 456 N.E.2d 39 (1983) (considering a bill passed in 1967, under the 1870 Constitution).

127. The author, who was Parliamentarian of the House in 1973-74, has observed the phenomenon just described. For a longer analysis, see Gherardini, *Effective Date of Laws*, 11 J. MAR. J. 363 (1977).



to “amend” a bill passed by the General Assembly<sup>128</sup> enables a Governor to “propose” a bill to each house. Does the approval of the proposed changes by each house mean a new “passage” of the bill for purposes of the effective date of laws provision? In *People ex rel. Klinger v. Howlett*,<sup>129</sup> the Illinois Supreme Court said it was; since the Governor’s proposed changes were “approved” after July 1st of a calendar year, the bill did not become effective until July 1st of the following year. This decision, among others,<sup>130</sup> has only served to confuse everyone about the effective date of a bill, especially a bill subjected to the Governor’s amendatory veto.

Finally, the 1970 Constitution made a major change in its predecessor’s prohibition of special legislation. The 1870 Constitution, like most late-nineteenth-century constitutions, banned the passage of “special or local laws.” Its purpose was to avoid favoritism in legislation, and its method was to list the types of laws which the General Assembly could not pass.<sup>131</sup> The 1970 Constitution’s solution, found in Article IV, Section 13, is simply to prohibit special legislation and to give the courts the power to decide whether the legislature could have drafted a general bill instead of a special or local one.

This is an enormous power for the judiciary, for an activist court could easily find many instances in which a law is “special” and could have been “general.” For instance, a number of Illinois statutes confer benefits only upon persons who are at least 65 years old. Is this special legislation? Certainly, the General Assembly could instead have passed more general laws, simply by extending the benefit to everyone, regardless of age. Yet the Illinois Supreme Court has refused to declare a senior citizens’ homestead exemption to be special legislation<sup>132</sup> and has generally been very reluctant to exercise its increased power.<sup>133</sup> The judges must know that their entry into this political thicket could give rise to an increase in litigation and to legislative animosity toward the judiciary. In fact, there is some

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128. See *infra* text accompanying notes 136-139 for a discussion of the amendatory veto. See also Van Der Slik, *Reconsidering the Amendatory Veto for Illinois*, 8 N. ILL. U.L. REV. 753 (1988).

129. 50 Ill. 2d 242, 278 N.E.2d 84 (1972).

130. See particularly *People ex rel. Am. Federation of State, County and Municipal Emp. v. Walker*, 61 Ill. 2d 112, 332 N.E.2d 401 (1975); *City of Springfield v. Allphin*, 50 Ill. App. 3d 44, 365 N.E.2d 249 (1977), *modified*, 74 Ill. 2d 117, 384 N.E.2d 310 (1978).

131. ILL. CONST. of 1870, art. IV, §22.

132. *Doran v. Cullerton*, 51 Ill. 2d 553, 283 N.E.2d 865 (1972).

133. See, e.g., *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972); *Bridgewater v. Hotz*, 51 Ill. 2d 103, 281 N.E.2d 317 (1972).



evidence that the courts regard Article IV, Section 13, as nothing but surplusage to the equal protection clause.<sup>134</sup>

Apart from these six major changes, the constitution made several less important amendments to legislative powers and procedures. Article IV, Section 5 requires the General Assembly to convene annually and declares it to be “continuous” throughout the two years of a “session.” By 1970, the legislature was virtually meeting annually anyway. Being a “continuous” body has enabled the legislature to abolish many of its “commissions,” which were really joint committees with “public” members. They were designed to operate when the General Assembly could not constitutionally be in session and, therefore, its regular committees also could not meet. Section 5 also allows the presiding officers of the House and Senate, acting jointly, to proclaim a special session of the legislature. This is in addition to the power to convene special sessions traditionally held by the chief executive: the monarch, the President, or, in Illinois, the Governor. These changes have modernized legislative sessions and worked quite well.

The 1970 Constitution’s change in filling legislative vacancies has not been as effective. Article IV, Section 2(d) requires the filling of a vacancy in the membership of the House or Senate “as provided by law.” The current statute calls for filling vacancies by a committee formed of leaders of the incumbent’s party and district, a method of dubious constitutionality, as it grants private persons the power to fill a public office.<sup>135</sup>

### C. THE ELECTED EXECUTIVE OFFICERS

In 1848, in a burst of populist fervor, Illinois began the practice of electing at least a half-dozen officers of the executive branch. By 1969, it had become almost conventional wisdom that principles of good public administration required only a few elected officers. There was general agreement at the convention, for example, that the Superintendent of Public Instruction, an elected officer, ought to be replaced by a chief state education officer appointed by a State Board of Education. The delegates also agreed that the Illinois Supreme Court ought to appoint its own clerk instead of having to deal with

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134. See, e.g., *Illinois Polygraph Soc. v. Pellicano*, 83 Ill. 2d 130, 414 N.E.2d 458 (1980); *Maldonado v. License Appeal Comm’n of Chicago*, 100 Ill. App. 3d 639, 427 N.E.2d 225 (1981); *Fox v. Rosewell*, 55 Ill. App. 3d 860, 371 N.E.2d 287 (1977).

135. ILL. REV. STAT., ch. 46 para.25-6, 8-5 (1985); *People ex rel. Rudman v. Rini*, 64 Ill. 2d 321, 356 N.E.2d 4 (1976).

one elected by the public on a partisan basis. Many delegates also favored eliminating the State Treasurer from the list of elected officers.

Ultimately the delegates chose to retain the election of a Governor and a Lieutenant Governor, to be elected jointly; an Attorney General; a Secretary of State; a Comptroller (who replaced the Auditor of Public Accounts); and a Treasurer. They proposed that four-year terms be retained for all of them, but that their election year be shifted to the even-numbered year in which the electors do not vote for a President. This decision met with general approval, for most observers assumed, because of straight-party-line voting, that the Presidential candidates at the "top of the ticket" carried the lesser-known officers with them on their "coat tails." This proposal, they thought, would eliminate the coat tail effect, at least as far as Presidential coat tails are concerned.

To implement this proposal, the delegates created a two-year term for state officers elected in 1976, to be followed by four-year terms beginning in 1978. For two reasons, it might have been better to create six-year terms for officers elected in 1972. First, the officers elected in 1976 all found it extremely difficult to raise funds in 1976; supporters were reluctant, knowing they would be asked to contribute again two years later. Second, they found it a strain to administer their offices well for those two years, because they were forced to begin running for office again the day they were inaugurated in 1977.

Ironically, in the 1976 election, held in a Presidential year, the voters disproved the coat tail theory by splitting their tickets for federal and state offices. This trend continued in 1978, when the state executive officers were elected in a non-Presidential year, and it has continued since then. Perhaps the premises upon which the delegates based their decision to shift the election of Illinois officeholders to non-Presidential years disappeared in the 1970's—or perhaps they were wrong in the first place.

#### D. THE GOVERNOR

At the same time the convention decreased the number of elected executive officers, it strengthened or confirmed the powers of those few retained, except for the Lieutenant Governor. Foremost among the delegates' intentions was to concentrate power in the chief executive officer, the Governor. He retains the "supreme executive power,"<sup>136</sup> the basis of his authority to issue executive orders, includ-

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136. ILL. CONST. art. V, §8.



ing the newly-created power to issue an executive order reorganizing state government, and retains his post as commander-in-chief of the state militia.<sup>137</sup>

By any estimate, the most important new powers of the Governor are the amendatory veto and the reduction veto. These new powers, especially when combined with the general and item vetos he already possessed,<sup>138</sup> have given the Governor of Illinois as powerful a collection of vetos over legislation as those given any Governor in the country. The reduction veto is really a partial-item veto and applies only to amounts of appropriations. The general, item and reduction vetos are powerful fiscal management tools. In fact, one court has said that, partly because he has these tools, the Governor may not reserve or "impound" funds appropriated by the General Assembly.<sup>139</sup>

The amendatory veto is far more controversial. The Governor may use the general and amendatory vetos regarding both appropriations and non-appropriations bills. From the first uses of the amendatory veto by Governor Ogilvie in 1971, this power has been a source of friction between the legislature and the Governor. In *People ex rel. Klinger v. Howlett*,<sup>140</sup> the Illinois Supreme Court said in dictum that a Governor could not use the amendatory veto to strike all of the text from a bill and re-write the text.<sup>141</sup> This was a perplexing statement because, first, it was dictum, and second, Governor Ogilvie had in fact retained the substance of most of the passed bill, using the amendatory veto as a means to present a "cleaner" and easier-to-read text to the legislature during its 1971 fall veto session. Moreover, his reason for proposing those changes in the text of the original bill was not to introduce new concepts into a passed bill, but simply to conform the bill to the requirements of a United States Supreme Court opinion that came down after the bill had virtually cleared all legislative hurdles and the Spring, 1971 session of the General Assembly was winding down.<sup>142</sup>

The amendatory veto remains just as controversial today. The General Assembly has adopted neither formal nor informal procedures to force a Governor to consult with the legislative leaders and legis-

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137. ILL. CONST. art. XII, § 4(a).

138. ILL. CONST. art. IV, §9.

139. *West Side Org. Health Servs. Corp. v. Thompson*, 73 Ill. App. 3d 179, 391 N.E.2d 392 (1979), *rev'd on other grounds*, 79 Ill. 2d 503, 404 N.E.2d 208 (1980).

140. 50 Ill. 2d 242, 278 N.E.2d 84 (1972).

141. *Id.* at 248-49, 278 N.E.2d at 88.

142. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

lators most interested in the bill before recommending changes in the text. Governors have occasionally—perhaps even regularly—succumbed to the temptation to use amendatory veto messages as “bully pulpits,” or, more accurately today, press releases. Since any attempt to restrict a Governor’s changes to “technical” ones, as opposed to “substantive” changes, would merely shift the battleground to litigation over the meaning of “technical” and “substantive,” there appears to be no resolution to this dilemma.

#### E. THE LIEUTENANT GOVERNOR

The Lieutenant Governor, by contrast, lost more power than any other elected state officer. He lost his official power base, the Presidency of the Senate. Although he runs for the nomination separately from the gubernatorial candidates, he loses all official independence immediately after the primary, because he runs for election jointly with the gubernatorial nominee. After the election, he has no constitutionally-designated duties; in effect, the Governor, by request, and the legislature, by statute, decide how he will spend the next four years.

Since 1980, two dominant problems with the office of Lieutenant Governor have surfaced. The first problem was the apparent powerlessness felt by at least one incumbent, Dave O’Neal. On July 31, 1981 he resigned, saying, in words reminiscent of John Nance Garner’s description of the Vice-Presidency, that he was frustrated. It is a mark of the lack of importance the convention attached to the Lieutenant-Governorship that, alone of all the executive offices, it cannot be filled if a mid-term vacancy occurs. The Lieutenant Governor, unlike his predecessors, does not even become Acting Governor whenever the elected Governor crosses the borders of the state. His predecessors in office, according to aficionados of Illinois history and politics, sometimes had a splendid time while “Governor for a day.” Today, the Lieutenant Governor of Illinois has only the constitutional power to succeed to a vacant Governorship—or, as John Adams said, “Today I am nothing; tomorrow I may be everything.”<sup>143</sup>

The other problem surfaced in the March, 1986 Democratic primary. For various reasons, most of them related to internal struggles within the Democratic Party in the early 1970’s, the General Assembly had never required the gubernatorial and lieutenant-gubernatorial hopefuls in any party to run “as a team” in the primary.

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143. See Locin, “*Light Guv*”: *Spotlight on an Invisible Office*,” Chicago Tribune, May 11, 1986, § 5 at 4, col. 3.



Until 1986, no real disasters had resulted, although some winners of their parties' gubernatorial primaries may have been unenthusiastic about the voters' selections for their running mates. In 1986, however, Adlai Stevenson found he would have to run on the Democratic Party ticket with a candidate he did not know, he did not like and whose policies he found anathema. His subsequent resignation of the nomination and formation of a third party are too well-known to need recounting here.

#### F. THE ATTORNEY GENERAL

In comparison to the power of the Governor, the powers of the Attorney General, Secretary of State, Comptroller and Treasurer changed very little. The convention confirmed their pre-1970 status.

In a world in which no public official can move without consulting a lawyer, "the legal officer of the State" plays a key role. Pre-convention case law suggested that the Attorney General was the only person who could act as lawyer for the state.<sup>144</sup>

Since 1971 a series of court decisions have confirmed a broad interpretation of the Attorney General's powers. The three most important cases are *People ex rel. Scott v. Briceland*,<sup>145</sup> which confirmed the power of the Attorney General to represent state agencies, if he so chooses, and two cases which allow him to choose which state agency he wants to represent, if two agencies are adverse parties to a court proceeding.<sup>146</sup> With these impressive victories behind the office of the Attorney General, it is clear that the position is now second only to the governorship in power.

The potential for conflict between the Attorney General and his fellow-officers increases with the amount of legal work in which the state is involved, and is further heightened by different political affiliations of holders of those offices. From 1973 to 1977, when the Attorney General and Governor were of different political parties for the first time in Illinois history, the conflicts were frequent and open. Republican Attorney General William J. Scott, moreover, had ambitions for the office then held by Democratic Governor Dan Walker. From 1983 to the present, the Democratic Attorney General and the Republican Governor have apparently cooperated better. One must wonder, however, if their relationship would have been so amicable

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144. *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130 (1915).

145. 65 Ill. 2d 485, 359 N.E.2d 149 (1976).

146. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 372 N.E.2d 50 (1977); *Scott v. Cadagin*, 65 Ill. 2d 477, 358 N.E.2d 1125 (1976).

if Neil Hartigan had been his party's nominee against James Thompson in 1986.

#### G. THE SECRETARY OF STATE

The Secretary of State, the next-highest-ranking officer, is chief administrator of a variety of state services, from granting corporate charters to issuing and revoking driver's licenses. Because the Constitution made no change in his status, it has had no impact on his office whatsoever.

#### H. THE FISCAL OFFICERS: COMPTROLLER AND TREASURER

The Comptroller and Treasurer are the two fiscal officers of the executive branch. Although many delegates questioned the wisdom of retaining a Treasurer, who does little more than invest the state's funds, the convention voted to retain the position as an elective office, and, in fact, it made no change at all in his status.

The position of the Comptroller was a somewhat different matter. Illinois splits its fiscal powers among four officers. The four officers having fiscal powers before 1971 were the Governor, the Auditor of Public Accounts and the Treasurer, all elected officers of the executive branch, and the Auditor General, an officer of the legislative branch then created by statute. The most important fiscal power, that of creating an executive budget, has always belonged to the Governor. The function of "post-auditing" has belonged since 1956 to the legislature's own Auditor General. That left the elected state officer of the executive branch, entitled the Auditor of Public Accounts, with little to do but estimate revenues available for a given period and order the Treasurer to release funds.

In 1970 the convention made the Auditor General a constitutional officer situated within the legislative branch and abolished the office of Auditor of Public Accounts, creating in its stead the more modern position of the Comptroller. But with few exceptions, the Comptroller has the same duties as the Auditor of Public Accounts did. He maintains "the State's central fiscal accounts" and orders "payments into and out of the funds held by the Treasurer."<sup>147</sup> The chief role of the Comptroller, therefore, is that of a "pre-auditor." "Pre-auditing" is the process of controlling expenditures before they are made—i.e., requiring authorization from someone who makes sure they are

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147. ILL. CONST. art. V, §17.



authorized by the budget or appropriation.<sup>148</sup> In accordance with modern administrative practice, the Comptroller also regularly estimates the revenues available to the state. As the technology of public fiscal management improves, the role of the Comptroller may become increasingly sophisticated. Apart from regularly issuing press releases, however, no Comptroller as yet has actively sought to expand his official status.

To summarize, the chief contribution of the 1970 Constitution to the legislative and executive branches has been the modernization of the terminology and procedures of the two “political branches.” The convention stripped Articles IV and V of their constitutional deadwood, conformed the procedures to modern political and administrative practices, and introduced the terminology of the mid-twentieth century. Both political branches acquired some modern and more sophisticated tools to use in making policy and laws. In that sense, both branches became powerful—and the balance of power between them remains much the same as before.

## VI. JUDGING DISPUTES

(Art. VI; Separate Proposition 2)

The third branch of government is the judicial branch. Although judges obviously have an impact on the political life of Illinois, their official role is not that of policy-makers, but of dispute-settlers. They decide issues of law which others have brought before them, but they cannot initiate either policy or lawsuits.<sup>149</sup> In order to decide cases impartially, a judge should be free of outside influences, including partisan considerations.

The 1970 Constitution has had several important effects upon the judiciary and the people of Illinois. The first resulted from its modernization of Article VI—“The Judiciary.” The “old” judicial article dated not from 1870, however, but from 1962, when the legislature proposed and the people adopted, an amendment completely revising the judicial structure of Illinois. The 1962 amendment, which became effective January 1, 1964, established the three-tiered

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148. Professor Glenn W. Fisher’s definition of “pre-audit” in a letter to the author, dated February 12, 1979. A copy of the letter is permanently on file at the N. ILL. U.L. REV.

149. The issue of a court’s power to file lawsuits is one of the issues in *Madden v. Cronson*, 114 Ill. 2d 504, 501 N.E.2d 1267 (1986), *cert. denied*, 108 S. Ct. 73 (1987).

and centralized judicial system which observers have praised as the most modern and efficient in the country. Like any new system, however, it had shortcomings, and the six years' experience with it between 1964 and 1970 showed where those shortcomings were.

Some of those who had been active in drafting and promoting the 1962 amendment played a significant role at the 1970 convention. They had that rare opportunity of which every drafter dreams: the chance to correct his draft after giving it a trial run. The convention adopted several such corrections. For example, the magistrates, a type of trial judge, had, until 1970, been appointed by the judges of the circuit court (full-fledged, elected trial court judges) and had served at the circuit judges' pleasure.<sup>150</sup> The convention changed the title "magistrate" to "associate judge" and gave the newly-dignified jurists the comparative security of four-year terms.<sup>151</sup> Those two changes have given those judges an enhanced status in the judicial system.

A second effect of the new constitution upon the judiciary concerns the judicial selection process. One of the most controversial issues in Illinois government, then and now, is the method of selecting judges. Should they be elected or appointed? In either case, how? Should they have to declare a party affiliation or not? If the delegates had not postponed resolution of this sensitive question by submitting it to the people as one of the issues to be voted upon separately, the convention would almost certainly have foundered on this one issue. The dispute between the advocates of electing judges and the advocates of appointing judges was perhaps the most divisive of the whole convention. The dispute among the voters turned out to be equally sharp; this was the most debated of the four propositions submitted separately to the voters. Even though a substantial minority of the voters—forty-six percent—voted to appoint judges, the majority decided to retain the elected-judges system, although in modified form. For the first time in Illinois history, the voters were allowed to make the specific choice between the two methods of selecting judges: appointment or election.

Since the people voted to retain the election method of selecting judges, rather than change to the appointment method, one could well ask whether there really has been any change in the selection process. The fundamental issue, after all, is whether judges should be elected or appointed. In comparison, all the other issues may be only details.

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150. ILL. CONST. of 1870, art. VI, §12.

151. ILL. CONST. art. VI, §8.



## ELECTING JUDGES

Although the voters decided to retain the election method, there have been changes in the nomination procedure and in the vote needed for retention in office. Under the 1962 judicial article, judicial candidates were nominated by a party convention; under the election method adopted in 1970, they are nominated at a primary or by petition. Consequently, it is now possible for lawyers who are not slated by the party to be nominated by their party's primary electors and become the party's nominees or to obtain a ballot position by obtaining enough signatures on a petition. The most notable examples of this phenomenon were two Illinois Supreme Court Justices, James A. Dooley and William C. Clark, who were nominated over the Democratic Party's "slated candidates" in 1976. As a consequence, one could say that although judges are still chosen at elections, they are nominated for election differently and that this change has made a difference.

Once elected, a judge may be removed from office more easily than before, because the delegates raised the percentage of the favorable vote needed to retain office from fifty percent to sixty percent. In 1974 the people of Cook County voted not to retain a circuit court judge in office.<sup>152</sup> In 1976, they voted not to retain an influential circuit court judge, the chief of the Criminal Division in Cook County,<sup>153</sup> and in 1978, they voted not to retain the Chief Judge of the Circuit Court of Cook County.<sup>154</sup> Also in 1978, Downstaters voted not to retain three resident circuit judges.<sup>155</sup> Since then seven circuit judges have not been retained, for a total of thirteen rejected. No appellate or Supreme Court level jurists have been in any danger of losing their seats.<sup>156</sup> In 1984 and 1986, when many observers thought

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152. Judge David Lefkovits received a 59.8% favorable vote. The United States Supreme Court upheld the validity of the extraordinary majority vote requirement for retention in *Lefkovits v. State Bd. of Elections*, 424 U.S. 901 (1975).

153. Judge Joseph A. Power received a 58.8% favorable vote.

154. Judge John Boyle received a 59.1% favorable vote.

155. Judge William A. Ginos, Jr., resident circuit judge of Montgomery County (4th Judicial Circuit), received a 58.4% favorable vote; Judge Albert Pucci, resident circuit judge of Putnam County (10th Judicial Circuit), received a 59.8% favorable vote; and Judge Charles W. Iben, resident circuit judge of Peoria County (10th Judicial Circuit), received a 50.9% favorable vote.

156. Of the 718 judges of all ranks who "ran on their record" from 1972 to 1986, 13 were rejected. Aside from those mentioned in the text, three Downstate judges were rejected in 1980; one Cook County judge was rejected in 1982; none were rejected in 1984; and three Cook County judges were rejected in 1986. Total rejection rate: 1.8%.

the public's reaction to the "Greylord" scandal in Cook County would result in mass rejection of judges up for retention, the circuit court judges still survived the retention process.<sup>157</sup> Apparently, all of the rejections were the result of concerted campaigns by the press, citizens' groups and the bar. In effect, Illinois judges are still elected, but they are subject to a "recall vote" at the end of their terms, a recall that rarely occurs.

A third, though indirect, result of the new judicial article has been a continuing drive for the appointment of judges system. Proponents of "merit selection" contend that both of the above two developments indicate citizens are dissatisfied with the judiciary and with the manner in which they are selected. They point to the Cook County judiciary's survival of the Greylord scandal in 1984 and 1986 as proof also that the public thinks that the retention system does not work. "Bad" judges, they say, almost always have the passive and sometimes the active support of the bar associations and the press; how can voters be expected to know more and do more than the bar and the press? Supporters of the present system counter this argument by saying that the low rate of rejection is proof that the voters are quite satisfied with the judiciary and wish to retain the power to elect their judges.

Every year the legislature considers a form of the gubernatorial judicial-appointment system designed at the 1970 convention: "merit selection," sometimes called the "Missouri plan." So far, it has not passed a resolution for a constitutional amendment on judicial selection, although that will continue to be one of the major issues facing it. If a convention is called in 1988, this issue will almost certainly be the dominant constitutional question at the convention.

When the appointment vs. election issue arises, it would be well to examine the record of the Illinois Supreme Court in filling vacancies. Under Article VI, Section 12(c), the Supreme Court routinely fills vacancies unless otherwise provided by law. Since there is no statute on vacancies, the Supreme Court has filled dozens of positions since 1971. A study of its procedures and the quality of its appointments might be useful in estimating the effect of changing to an appointment method for the Illinois judiciary.

A fourth change made by the new Constitution is the creation of the Illinois Judicial Inquiry Board. Individual judges, regardless of

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157. That none were defeated in 1984, during the height of the publicity over Greylord, is amazing until one remembers that the bench, organized bar, and even the U.S. Attorney pled with the public not to reject the judges up for retention, since none were targets of the Greylord investigation.



how they were selected, may in time become physically or mentally unable to serve, or may commit unethical acts. The phrase “judicial discipline” sounds harsh, but it conveys the requirement that judges conform to certain standards of conduct. If they do not conform, the bar and the public suffer.

In order to give those two groups a role in enforcing standards of judicial conduct, the convention established the Board as the first step in investigating the fitness of a judge. The Governor appoints four non-lawyers and three lawyers to the Board, and the Supreme Court appoints two circuit judges. The nine members hear and investigate charges of unfitness. If they find that the judge is probably unfit, they file a complaint with the Illinois Courts Commission, a panel of five judges who have had the responsibility for judicial discipline since 1964 (under the 1962 Amendment to the 1870 Constitution). If the Commission agrees with the Board, it can remove or discipline the judge. The cases concerning confidentiality of communications to the Board and of the Board’s proceedings have generally upheld the confidentiality of the proceedings.<sup>158</sup>

Although the Commission thus far continues to regulate judicial discipline, an early Illinois Supreme Court case called into question the authority of the new Judicial Inquiry Board. In 1977, that court held in *People ex rel. Samuel G. Harrod, III, Judge, Petitioner v. The Illinois Courts Commission*,<sup>159</sup> that the Supreme Court could define, and therefore restrict, the Board’s jurisdiction, and that the Board had no constitutional power to hear a complaint against Harrod, because his alleged misconduct, the imposition of an improper sentence, was a proper subject for appeal to a higher court.

Apart from the power of the Judicial Inquiry Board and the Illinois Courts Commission to discipline judges, there are only two ways to remove incompetent or, worse, corrupt judges. One is rejection by the voters at a retention election, already discussed. The other is impeachment by the General Assembly. Article IV, Section 14 specifically allows the legislative branch to impeach and remove both judges and officers of the executive branch. The process, as the country learned during the Watergate crisis of 1973-74, is so costly in time and energy, however, that anyone contemplating using impeachment to remove any official must realize he is bringing the legislative

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158. *Owen v. Mann*, 105 Ill. 2d 525, 475 N.E.2d 886 (1985); *People ex rel. Judicial Inquiry Board v. Hartel*, 72 Ill. 2d 225, 380 N.E.2d 801 (1978), *cert. denied*, 440 U.S. 915 (1979); *In re Petition of Judicial Inquiry Board*, 128 Ill. App. 3d 798, 471 N.E.2d 601 (1984).

159. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

branch to a virtual halt for the duration. Therefore, as a practical matter, the removal and discipline of judges rests with the Judicial Inquiry Board and the Illinois Courts Commission.

The *Harrod* decision means that the Illinois Supreme Court has great say in determining the power of the Board and Commission to regulate judicial conduct. It means that the Supreme Court justices, who draft and promulgate the rules of judicial conduct,<sup>160</sup> will now also define the role of non-judges in disciplining judges. The judges, the guardians of justice in Illinois, are the final arbiters over themselves. The question is, as always, who will guard these guardians?

## VII. FISCAL AFFAIRS

(Articles VIII and IX)

The "fiscal affairs" of Illinois, as dealt with by the 1970 Constitution, comprise more than just the collection of taxes. They also include state and local governments' record-keeping of the collection and use of public funds, budgeting and appropriating funds and state auditing of public funds. The constitution also regulates the traditional types of revenue, such as income taxes, property taxes and state debt.

### A. FISCAL MANAGEMENT

Article VIII—"Finance" provides, in general and simple terms, for the orderly management of public funds. It is new to Illinois and unusual, if not unique, in state constitutions in America. None of the three branches of government has truly perceived the benefits of this article.

Although Article VIII is virtually unknown to the general public, it has great potential as a management tool in public administration. For example, Section 1 requires that records of the collection and use of revenue be open to the public. When coupled with Section 4's requirement that the legislature provide for systems of accounting by local governments, it could force both state and local governments to be more accountable to the public. To date, the courts have struggled with, but not entirely solved, the issues of how "open" the records of state and local governments must be, particularly in view of the emerging individual right to privacy and governmental need to protect the integrity of its records.<sup>161</sup>

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160. ILL. CONST. art. VI, § 13.

161. *Oberman v. Byrne*, 112 Ill. App. 3d 155, 445 N.E.2d 374 (1983); *Mid America Television Co. v. Peoria Housing Authority*, 93 Ill. App. 3d 314, 417 N.E.2d 210 (1981); *Pope v. Parkinson*, 48 Ill. App. 3d 797, 363 N.E.2d 438 (1977).



There is yet another role for Sections 1 and 4: if the legislature could use uniform accounting systems to compare the finances of one government to another's, it could more easily judge governmental efficiency. To date, however, the General Assembly has not mandated these systems, and the public shows little interest in the subject.

Article VIII, Section 2 deals with the state budget, which the Governor prepares annually and presents to the legislature. The very title "state budget" means a budget for all aspects of state government, including all three branches and the university system. Nonetheless, no state budget submitted so far has been that comprehensive. It must also be a "balanced budget"—that is, the amount of expenditures he proposes may not exceed the amount of revenue he estimates to be forthcoming that year. Section 2 also deals with the appropriation of funds, a function only the legislature can perform. The General Assembly also must "balance its budget," as it cannot appropriate more money than it estimates to be available that year. It may, however, make an appropriation that continues in effect beyond a year—a continuing appropriation.<sup>162</sup>

These balanced budget requirements are an example of the prescriptive "shall" meaning the permissive "may," since there is no feasible way for an entity outside the executive branch to compel the Governor to submit a balanced budget or an entity outside the legislative branch to compel the General Assembly to refrain from appropriating beyond the dollar amount it estimates will be available. Absent exterior, i.e., judicial, enforcement, the requirement of a balanced budget imposes only a moral duty upon the Governor and the legislature.

Section 3 of Article VIII provides for an Auditor General, whose task is to conduct a periodic audit of all "public funds of the State." This officer is the only one in government elected by the entire legislature; he is also the only officer of the legislative branch who is not a legislator. Because he must be elected by three-fifths of each house, serves a ten-year term and receives a salary which cannot be diminished during that term, he can be a very independent officer indeed.

The roots of this office date from 1956, when a massive scandal in the office of the Auditor of Public Accounts caused the legislature to create a commission and a legislative post-auditor to watch over the public funds it appropriated. The system worked so well that in 1970, the delegates decided to strengthen the powers of the office.

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162. *People ex rel. Ogilvie v. Lewis*, 49 Ill.2d 476, 274 N.E.2d 87 (1971).

Most important, they gave it the protection of constitutional status and definition.

In 1974, the General Assembly elected Robert G. Cronson, a Chicago lawyer and investment banker with experience in state government, to the office. He has conducted regular audits of state agencies and generally brought some more order to their accounts. Occasionally he issues reports on specific management problems, called performance audits, but only at the behest of the General Assembly.

The greatest controversy concerning the Auditor General has been over his attempts to conduct a financial audit of the judicial branch. Among its powers and duties, the Illinois Supreme Court regulates the admission to, and practice before, the bar through two agencies created and supervised by the Court: the Board of Law Examiners, which regulates admission to the bar, and the Attorney Registration and Disciplinary Commission, which regulates practice at the bar. The supreme court has allowed him to audit the Court's books, but these two agencies have consistently resisted his attempts to audit them. Eight years of litigation, some of it brought by The Chicago Bar Association on the side of the two agencies, has resulted in a Circuit Court decision on behalf of the two agencies.<sup>163</sup> Before this case was final in the Circuit Court of Cook County, the Illinois Supreme Court's acting administrator obtained an order from the Illinois Supreme Court to compel Cronson to perform a "partial audit"<sup>164</sup> of the supreme court, i.e., one that did not include an audit of the two agencies. Cronson filed an unsuccessful suit in federal court claiming that the Illinois Supreme Court's hearing a case brought by its own administrator violates Cronson's federal rights to due process.<sup>165</sup>

The questions of Illinois constitutional law are (1) whether the fees paid by lawyers and applicants to the bar are "public funds" within Article VIII, Section 3; (2) whether the two agencies of the Court are "state agencies"; and (3) whether Cronson's attempts to audit those funds violate the Separation of Powers clause of Article II, Section 1. Since the 1970 Constitution itself grants auditing powers

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163. *Chicago Bar Ass'n v. Cronson*, 82 L 50131 (Circuit Court of Cook County, April 21, 1987), currently on appeal to the Illinois Appellate Court, First District.

164. *Madden v. Cronson*, 114 Ill. 2d 504, 501 N.E.2d 1267 (1986), *cert. denied*, 108 S. Ct. 73 (1987).

165. *Cronson v. Clark*, 645 F. Supp. 793 (N.D. Ill. 1986); 810 F.2d 662 (7th Cir.), *cert. denied*, 108 S. Ct. 199 (1987).



to the Auditor General, it is clear that the “public funds” and “state agencies” questions are the only serious issues.<sup>166</sup>

For the moment, then, Article VIII is a sleeping giant whose potential for fiscal management by the Governor, the General Assembly and the public has never been reached.

## B. INCOME AND SALES TAXES

In 1970, Illinois had four major traditional sources of tax revenue: the income tax, the sales tax, the personal property tax and the real property tax. The income tax was and is solely a state tax, but the state rebates a percentage collected to some local governments. Although the state collects the sales tax, part of it goes to the state and the remainder goes to the municipality where the sale occurred. Since 1932, only local governments have imposed and collected taxes on real and personal property.

Until 1969, the major state-imposed tax was that on sales, which, for reasons of interpretation of the 1870 Illinois Constitution, was formally a tax on the occupation of retailing. But in that year, the Illinois Supreme Court held that the 1870 Constitution imposed no barrier to a state income tax.<sup>167</sup> The effect of that decision upon the 1970 Convention was enormous. It virtually guaranteed that the delegates would not seriously consider constitutionally prohibiting an income tax. The delegates did not change the structure of the income tax as they found it, but they placed two constitutional restrictions on it. One was the “8 to 5 ratio” limitation. This ratio reflects the tax’s two-rate structure—4% on corporations and 2% on individuals—or a ratio of 8 to 5. The delegates provided that the corporate rate should not exceed the individual rate at a ratio higher than 8 to 5. Presumably, this limitation provides business with some protection from a legislature more interested in the welfare (and votes) of individuals than in that of corporations. The 8 to 5 limit, however,

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166. The author freely admits she thinks Cronson, who is represented by Samuel W. Witwer, is absolutely right, and the Illinois Supreme Court, the Attorney Registration and Disciplinary Commission, the Board of Law Examiners and the Chicago Bar Association are absolutely wrong. She represented the Chicago Council of Lawyers in the state court litigation in its petitions for intervention and *amicus curiae*, taking Cronson’s side, both of which petitions were denied by the Circuit Court Judge hearing the case. At the reconvening of the delegates in Sept. 1987, those present and voting adopted a resolution saying that it had been their intent to give the Auditor General both the power and the duty to audit these two agencies of the Supreme Court.

167. *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E.2d 633 (1969).

does not prevent imposing a higher tax upon individuals than upon corporations, and the "replacement of personal property tax" surtax upon corporations in Article IX, Section 5(c) may be (and is) excluded from the 8 to 5 limit. The other constitutional restriction prohibited a graduated or progressive income tax, although the legislature may establish exemptions in such a way as to achieve the effect of graduation.

The sales tax, now somewhat reduced in importance as a revenue source, appears only tacitly in Article IX, Section 2, as a "non-property tax." If the General Assembly so decides, it may now drop the fiction of an "occupation tax" and simply call the tax a "sales tax." To date, it has not chosen to do so. The legislature also may now create exemptions from the occupation tax for such sales as those of food and drugs. It did so, on a graduated basis, in the early 1980's.

### C. TAXES ON PROPERTY

Long the mainstay of local governments and school districts in Illinois, taxes on real and personal property were the center of two of the most turbulent debates at the convention. The chief controversy over the real property tax was whether real property could be classified, so that owners of some types of real property paid taxes at a higher rate than others paid. The controversy over the personal property tax was whether the tax should be abolished by the constitution.

At the time of the convention, Cook County "classified" real property by its use. The county assessor first established the market value of the real property—the price it could fetch at an open market—and then established the "assessed valuation" of the real property. The "class" of real property having single-family homes, for example, was assigned an "assessed valuation" of about one-third of the home's market value. A shopping center, on the other hand, was assigned an "assessed valuation" of about 80% of the center's market value. When local taxing districts levied real property taxes, they imposed the levy upon the "assessed valuation" of the real property, e.g., "\$3.00 per each \$100 of assessed valuation." Although both the homeowner and the shopping center owner each paid a "3 percent tax," their tax bills were vastly different, even if the market value of their property was identical.

Why should there be classification of real property? One reason might be to impose a greater burden upon real property used to make a profit than upon real property used only for personal purposes. Another might be to encourage middle-class homeowners to stay within a big city, such as Chicago, or at least within the near suburbs,



such as those in Cook County that border Chicago. Or, to put it most simply, the theory behind classification may be that it helps to win the political support of a stable, conservative segment of the electorate: homeowners. Although only Cook County openly admitted it classified real property, there were strong indications that other counties informally classified, at least to a certain extent.

At the 1970 convention, almost all of the delegates from Cook, certainly all of those who were “regular Democrats,” wanted to retain Cook County’s power to classify real property. Although the “official” downstate position was against classification, some downstate delegates admitted privately that their counties also wanted the constitutional power to classify, even if the counties had no present intent to classify. As a compromise, the delegates decided to allow the counties with more than 200,000 people to classify, but to forbid smaller counties to do so. Although the Illinois Supreme Court has said that this distinction between large and small counties is constitutional, even if applied retroactively,<sup>168</sup> no county except Cook has taken advantage of the power to classify real property. The courts have made it clear, however, that valuations of individual parcels of property must be uniform within that parcel’s class.<sup>169</sup>

The ad valorem (“according to value”) personal property tax has been far more controversial. The delegates knew that the General Assembly would, in November, 1970, submit a proposed amendment to the 1870 Constitution which abolished that tax as it applied to individuals. They also assumed that the amendment would be adopted. To insure that the result of this amendment would carry over into the new constitution, they drafted Article IX, Section 5(b), which forbids the reinstatement of any ad valorem personal property tax abolished before the effective date of the new Constitution.

The delegates further realized that the personal property tax was the most unpopular, most unevenly-administered and least-collected tax in Illinois. They therefore decided to abolish it forever by a constitutional fiat. Opponents of the abolition, however, demanded that the local governments and school districts be guaranteed a new source of the revenues they would thereby lose. The compromise between the two forces was Article IX, Section 5(c), which prescribed a deadline of January 1, 1979 for the General Assembly to abolish the remaining personal property tax. It also required the legislature

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168. *People ex rel. Kutner v. Cullerton*, 58 Ill. 2d 266, 319 N.E.2d 55 (1974).

169. *People ex rel. Hawthorne v. Bartlow*, 111 Ill. App. 3d 513, 444 N.E.2d 282 (1983).

to enact concurrently a replacement tax, to be imposed only upon the taxpayers relieved of the burden of paying the tax by this second abolition—in short, businesses, since businesses are the primary “non-individuals” in Illinois.

Section 5(c) has caused untold confusion in the legislature and the courts. The legislature was unable to abolish the tax because it could not agree upon a workable, constitutional replacement for the revenues lost. In 1973, ruling on an attempt at partial abolition of the tax, the Illinois Supreme Court said that any time the legislature attempts even such a partial abolition, it must replace the revenues thereby lost.<sup>170</sup> The Court also said that the abolition is not self-executing: if the General Assembly did not pass a bill abolishing the tax and replacing revenues by January 1, 1979, the tax would continue in effect indefinitely.

In 1978, the General Assembly submitted a proposed constitutional amendment that would have eliminated the 1979 deadline and made the abolishment language permissive instead of mandatory. In effect, it would have withdrawn the mandate to abolish the remaining ad valorem personal property taxes. The issues were complex, the public found all these constitutional nuances difficult to understand, and business groups and the press were split on the issue. The proposal received 56 percent of the vote, four percent less than the 60 percent approval needed for adoption. No one was surprised when the General Assembly adjourned in December, 1978, without abolishing the tax.

The saga of the ad valorem personal property tax had a reasonably happy ending. In 1979, in a baffling re-interpretation of Article IX, Section 5(c), the Illinois Supreme Court held that no ad valorem personal property tax could be collected after January 1, 1979.<sup>171</sup> In prohibiting the collection, however, the court still found the legislature responsible for finding replacement revenues. The General Assembly, not surprisingly, chose to replace revenue by imposing a special surtax on income taxes imposed upon businesses. The ad valorem personal property tax is dead; the special surtax on the income tax may live forever.

Another problem with property taxes, whether real or personal, is that of exemptions from the tax. As long as the tax on real and personal property was the major source of state and local revenues from 1818 to 1932, exemptions from it were, in effect, exemptions from the general tax burden. For over a hundred years, Illinois

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170. *Elk Grove Engineering Co. v. Korzen*, 55 Ill. 2d 393, 304 N.E.2d 65 (1973).

171. *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 390 N.E.2d 847 (1979).



constitutions have allowed the legislature to exempt property used for county fairs and “for school, religious, cemetery and charitable purposes.” The legislature has frequently exercised its power to exempt both real and personal property.

In the past fifty years, there has been a movement towards granting exemptions to the elderly and other groups unusually hard-pressed by real estate taxes. The General Assembly enacted a homestead exemption for senior citizens in 1970, but the Illinois Supreme Court held that the 1870 Constitution prohibited such an exemption.<sup>172</sup> Because the new Constitution specifically allows the legislature to “grant homestead exemptions or rent credits,”<sup>173</sup> the General Assembly re-passed the bill under the new Constitution. The Illinois Supreme Court held it constitutional under the new provision,<sup>174</sup> and the legislature soon created a homestead exemption for all. This exemption and the abolition of the ad valorem personal property tax are specific instances in which the new constitution has made a difference.

The elderly are not the only Illinoisans wishing to have exemptions from their real property taxes. In 1978, 1984 and 1986, veterans’ groups succeeded in persuading the General Assembly to place on the ballot amendments allowing the “post homes” of veterans’ groups to be exempt from property taxes. No amendment came close to receiving the 60% approval needed for ratification.<sup>175</sup>

Voters have expressed greater sympathy for homeowners whose residences are about to be sold at delinquent tax sales. In 1980, they approved an amendment allowing the legislature more power to give greater rights of redemption to homeowners whose homes are about to be “sold for taxes.”<sup>176</sup> It is probable that the General Assembly had the power to expand the right of redemption under Article IX, Section 8, as drafted in 1970. Such, however, is the emotional attachment to the fear of “losing one’s home” that surrounds this constitutional provision.

Article IX, Section 7 concerns “overlapping taxing districts,” and, arcane as it sounds, deals with a problem arising from constitutional mandates to make property taxation uniform. If a taxing district, particularly a school district, covers—or “laps over”—two or more counties, property assessed by the county assessor in one county may not be valued on the same basis as property in the other

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172. *Hoffman v. Lenhausen*, 48 Ill. 2d 323, 269 N.E.2d 465 (1971).

173. ILL. CONST. art. IX, §6.

174. *Doran v. Cullerton*, 51 Ill. 2d 553, 283 N.E.2d 865 (1972).

175. Gaudet, *Amending the State’s Constitution*, 12 ILL. ISSUES 30 (Nov. 1986).

176. *Id.*

counties. This is especially inequitable if one county classifies, as Cook County does, and the other counties in the taxing district do not. Owners of single-family homes in the Cook County part of the district will receive a tax break that owners of single-family homes in the other counties do not—a significant difference in tax burdens where school districts are concerned. This difference may amount to constructive fraud.<sup>177</sup> The General Assembly has not completely addressed this problem.

#### D. STATE DEBT

Aside from taxes, the state government has two major revenue sources: federal funds and borrowing, usually on a long-term basis. The new constitution deals only with the latter.

Going into debt through borrowing is viewed by many as a proper way to finance the construction of capital improvements, such as buildings, as long as the term of the debt does not exceed the “useful life” of the improvements. Under the 1870 Constitution, the state could not have more than \$250,000 in debt unless the electorate approved more debt at a referendum.<sup>178</sup> This unrealistic limit soon spawned many quasi-state agencies, which were actually, though not officially, under the control of the state government. For example, the Illinois Armory Board built the state armories and still runs them under the direction of the state, but the debt it incurred is not backed by the full faith and credit of the state; therefore, it is not part of the “state debt.” When the General Assembly has failed to separate a quasi-state agency sufficiently from the state to evade the debt limit, the bonds issued by the agency have been found unconstitutional. The last such failure occurred in 1970; the Illinois Supreme Court invalidated an agency created to issue road construction bonds.<sup>179</sup> The convention, which was meeting at the time, abolished the debt limit but created the requirement that three-fifths of each house must approve a bill incurring state debt.<sup>180</sup> Although the approval of three-fifths of each house is difficult to obtain, the state legislature has sometimes passed a debt bill. For example, in 1971, it re-passed substantially the same highway debt bill declared unconstitutional a

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177. The one case is not dispositive of the constitutional issues. *People ex rel. Skidmore v. Anderson*, 56 Ill. 2d 334, 307 N.E.2d 391 (1974).

178. ILL. CONST. of 1870, art. IV, §18.

179. *Rosemont Bldg. Supply, Inc. v. Illinois Highway Trust Auth.*, 45 Ill. 2d 243, 258 N.E.2d 569 (1970), *appeal after remand*, 51 Ill. 2d 126, 281 N.E.2d 338 (1972).

180. ILL. CONST. art. IX, §9(b).



year earlier. The Supreme Court later found the new bill constitutional under the new constitution,<sup>181</sup> providing yet another example of the difference the new constitution has made.

The only significant problem of interpretation of Section 9 is the definition of "state debt." The courts have made it clear that debt created by special districts is not "state debt," even though the districts are created by legislation and, in the case of the Regional Transportation Authority, encompass more than one county.<sup>182</sup> On the other hand, when the state legislature or a group of entities that are clearly state agencies, such as public universities, create an entity whose sole purpose is to incur debt to purchase equipment for state agencies, then that is "state debt."<sup>183</sup>

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There have been few surprises in the revenue article. The delegates took the basic revenue structures, including the income tax, as they found them, and gave them clearer constitutional status. Their one attempt at major change, total abolition of the personal property tax, was ultimately successful. Since 1970, the legislature and the public have shown no inclination to make major changes in the revenue structure, although the legislature has taken advantage of its new powers to create exemptions by exempting food and drugs from the sales tax and "homesteads" from the real property taxes. The liberalization of the power to incur state debt has not resulted in a drastic increase of state debt, suggesting that the true limit on incurrence of debt is either the fiscal prudence of the legislature or the wrath of the citizens, but not the constitution.

The finance article has potential for enormous change. The legislature can encourage, if not exactly force, efficiency in state agencies and local governments, by requiring uniform systems of reporting and accounting. It can use the "balanced budget" provisions as a means of estimating revenues available in the coming year on a more sophisticated basis. So far, these management tools have not

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181. *People ex rel. Ogilvie v. Lewis*, 49 Ill. 2d 476, 274 N.E.2d 87 (1971).

182. *Day v. Regional Transp. Auth.*, 66 Ill. 2d 533, 363 N.E.2d 829 (1977); *Hoogasian v. Regional Transp. Auth.*, 58 Ill. 2d 117, 317 N.E.2d 534, *appeal dismissed*, 419 U.S. 988 (1974); *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 277 N.E.2d 319, *appeal dismissed*, 406 U.S. 965 (1971) (transportation district in part of one country).

183. Op. Att'y. Gen. No. S-1209 (1977) (the Illinois Educational Consortium). Cf. Op. Att'y Gen. No. S-362 (1971) (advising that revenue bonds issued pursuant to the State Colleges and Universities Revenue Bond Act did not require legislative approval).

been used to their full potential, largely because there is no political impetus to do so.

The post-auditing powers of the Illinois Auditor General have enabled the legislature to know more about the agencies of the executive branch, sometimes resulting in greater financial efficiency by those agencies.<sup>184</sup> Two agencies of the judicial branch, however, have prevented achieving the same results in the third branch of government.

## VIII. LOCAL GOVERNMENT

### (Article VII)

There are six types of governments in Illinois. One is the state. Another is the school district, a unique locally-controlled government which runs a public junior college or an elementary and/or secondary school system. The other four are the categories of "units of local government": counties, townships, municipalities and special districts.<sup>185</sup>

The oldest and largest of the four categories of units of local government is the county. There are 102 counties in Illinois, each governed by a county board elected by the people of the county. This unit has general supervisory and administrative duties. For example, it assesses and collects the property taxes, real and personal, levied by all of the school districts, municipalities and other taxing districts in the county.

Eighty-five of the counties (roughly the northern two-thirds of the state) are divided into townships, the second unit of local government. Each township has some duties assigned by the legislature, such as dispensing public aid or running the "township road" system. Townships do not perform as many functions as counties do.

The third unit of local government is the "municipality," which is a general term including cities, towns and villages. In Illinois, a "municipality" is both Chicago, with its 3,000,000 residents, and a tiny hamlet with a hundred residents. Municipalities have many administrative duties assigned by the legislature and are governed by municipal councils, commissions or boards of trustees elected by the residents of the municipality.

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184. The author, who was Chairman of the Illinois State Civil Service Commission from 1977-83 found the Auditor General's reports of the Agency very helpful in achieving fiscal economy and efficiency.

185. ILL. CONST. art. VII, §1.



The last unit of local government, the special district, is a relatively autonomous local government that usually provides a single service.<sup>186</sup> Police districts, fire protection districts, street lighting districts, curb districts, sewer districts, water districts, garbage collection districts, transportation districts and mosquito abatement districts are all examples of Illinois special districts. Although one special district, the Regional Transportation Authority, covers the six counties of the Chicago metropolitan area, most special districts are smaller than a county. Some of them, in fact, cover only a fraction of a township, municipality or county and provide service only to that fraction of a larger unit.

The history of local government in Illinois is colorful and problem-ridden. In 1969, the major problem with Illinois local government was that there were too many local governments. With 6,454 counties, townships, municipalities, special districts and school districts,<sup>187</sup> Illinois had more local governments than any other state. Although property owners were not terribly heavily pressed by taxes, some did support ten or twelve separate taxing districts. For example, of each suburban tax dollar, seventy-five to eighty percent went to school districts, and the remainder to a county, usually to a municipality, often to a township, and always to several special districts.

The first reason for this over-abundance of special districts was the 1870 Constitution's limit on indebtedness to five percent of the assessed valuation of property under each local government. As each unit of government outgrew its debt limit, the community met the growing demand for services by creating a new special district. The second reason was that political factors helped perpetuate these new districts. Once a district was created, its officers had a vested interest in its continuation, and its constituency wanted to ensure that the services it provided would continue. Finally, each district had bonded indebtedness and found it difficult to find another local government which could assume its debt, because the other local governments in the area were usually at their own five percent debt limit.

Counties and municipalities are "general purpose" governments and therefore the logical units to absorb the special districts. For two reasons, however, they were not able to take over many of the districts' functions. First, they, too, were subject to the five percent

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186. Anderson and Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution*, 9 J. MAR. J. 697, 700 n.8 (1976).

187. *Id.* at 701 n.12.

debt limit and could not absorb more debt. Second, and more importantly, they also did not have any constitutionally-granted powers; they had only those powers the legislature chose to give them. The Illinois courts have long followed a principle of local government law called "Dillon's Rule."<sup>188</sup> According to this rule, a local government has only those powers "granted in express words," powers "implied in or incident to" the expressly-granted powers and powers "essential to the accomplishment" of the purposes of the local government.

The Illinois courts interpreted "Dillon's rule" so strictly that it was said that no local government could take any action unless it could point to statutory authority to take the action. This interpretation worked no particular hardship on the special districts, which were, after all, very limited in their purposes and did not need "strong" powers. It had devastating results, however, upon counties and municipalities. The large counties, especially Cook, and the large cities, especially Chicago, often had the political and financial power base from which they could launch new programs to meet the growing urban and metropolitan ills of the twentieth century, but they first had to obtain enabling legislation from the General Assembly. The legislature soon found itself passing bills to meet the purely local needs of counties and cities in different parts of the state. In effect, Dillon's Rule promoted the special or local legislation theoretically prohibited by the 1870 Constitution. Even worse, the plethora of local governments promoted irresponsibility and inefficiency.

The constitutional convention delegates' solution to the problem was four-pronged. First, they liberalized the municipal debt limits, basing them upon the population and home rule status of the local governments.<sup>189</sup> Second, they drafted an intergovernmental cooperation provision that allowed local governments the broadest possible power to form agreements to share services. The delegates hoped that the governments would choose to share the costs of providing some special services instead of creating or maintaining special districts to provide them.<sup>190</sup> Third, the delegates made it relatively easy for counties and municipalities of all sizes, whether they have home rule powers or not, to create "special service districts."<sup>191</sup> This enables a county or municipality to provide services only to one geographical

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188. J. DILLON, *LAW OF MUNICIPAL CORPORATIONS* 237 (5th ed. 1911).

189. ILL. CONST. art. VII, §§6(k) and (7).

190. ILL. CONST. art. VII, §10.

191. ILL. CONST. art. VII, §6(l)(2) and §7(6).



part of its territory, imposing a special tax only upon the area served. They hoped that counties and municipalities would prefer creating a special service district directly under their control, allowing the creation of a special district, a completely different and separate unit of local government.

Finally, their most important innovation was the provision granting the strongest constitutional home rule power to counties and municipalities of any state in the country.

#### A. HOME RULE: AN OVERVIEW

An Illinois home rule unit may, subject to enumerated exceptions, "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."<sup>192</sup> Under the 1970 Constitution, more municipalities receive home rule powers automatically than in most states, and the powers they receive are stronger than those in any other state. Indeed, it is an indication of this grant's importance that the Local Government Article is sometimes called the "home rule article."

Only two types of local governments can obtain home rule status: municipalities and counties. Presumably because the delegates believed that larger cities had the most complex problems, which home rule could help solve, they gave automatic home rule status to every municipality with more than 25,000 people. Thus, on July 1, 1971, sixty-seven cities obtained home rule on the basis of their population as established by the 1970 Federal Census. Since then, thirty-four more cities have obtained that status automatically by population growth and four more by approval of the people at a special referendum.<sup>193</sup> Although the people of 25 cities have voted on the question of rejecting home rule powers, only four have chosen to do so.<sup>194</sup> One of those, however, is Rockford, the second largest municipality in Illinois. After sixteen years, home rule for municipalities is now more a matter of popular choice than a matter of population.

When the delegates considered county home rule, they thought primarily of Cook County, and, to a certain extent, of the five "collar counties" surrounding Cook and a few of the largest downstate counties. Given the Balkanization of the Chicago suburbs, the county

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192. ILL. CONST. art. VII, §6(a).

193. J. BANOVTZ & T. KELTY, HOME RULE IN ILLINOIS 8 (1977).

194. *Id.*

was the only unit of local government that had the geographical jurisdiction and powers sufficient to solve the problems of the suburbs, let alone of Chicago and its suburbs combined into one metropolitan area. Here the key to the effectiveness of home rule was not the population of the county, but its form of government. The delegates decided that only a county which elected a chief executive officer had the administrative structure to manage home rule powers wisely. In 1970, only Cook County had such an officer. Although the General Assembly passed a County Executive Act enabling other counties to elect a county executive and thereby to obtain home rule status,<sup>195</sup> no county has chosen to acquire that form of government and home rule. Nine counties, most with a substantial urban population, have voted on the issue, but every time opponents have defeated the proposal.<sup>196</sup> Since DuPage and St. Clair Counties now have a county-wide elected chairman of their county boards, they may have home rule, but their county governments have never openly addressed that question.<sup>197</sup> In retrospect, therefore, it appears that the delegates perceived that only Cook County had the political power base to support, not just the need for, county home rule. That perception is apparently still correct.

Home rule units have the powers to license, to tax, to incur debt, to change their form of government and to pass ordinances to protect the public health, safety, morals and welfare (the "police power"). Although some home rule units have used their powers to license and to change their form of government, most have not found it necessary to do so.

Some have incurred debt, but others have discovered that the electorate's disapproval and the financial market's occasional rejection of their bonds have put effective limits on that power. Still, many communities have incurred debt above their statutory limits. Much, if not most, of this debt is general obligation bonds, rather than revenue bonds, although revenue bonds are far from an extinct species in home rule municipalities. Home rule cities also use bank loans more and tax anticipation notes less than they did in the early years of home rule. Perhaps we can say, albeit cautiously, that the 1980's have been the decade when home rule cities began to use more

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195. ILL. REV. STAT. ch. 34 para. 701, *et seq.* (1977).

196. In 1972: DeKalb, Fulton (not so large), Lee (also not so large), Peoria, St. Clair and Winnebago, all Downstate counties; DuPage, Kane and Lake, all metropolitan counties. In 1976, Lake and Winnebago tried again, to no avail. See J. BANOVTZ & T. KELTY, *supra* note 190, at 9.

197. J. BANOVTZ & T. KELTY, *supra* note 193, at 9.



generally secured bonded indebtedness, which reduces the amount of the interest the municipality must pay to service the debt.<sup>198</sup>

Since the most frequently used and litigated home rule powers have been the police power and the taxing power, this report will discuss both, as space does not permit a full discussion of home rule.

## B. HOME RULE: THE POLICE POWER

The police power encompasses virtually everything a government can do to protect its citizens' safety (by enacting, for example, traffic laws, criminal laws and fire safety laws), and health (by passing sanitation laws, zoning laws and water supply laws). All of these areas can produce home rule problems, but it is impractical to recount all the litigation here.<sup>199</sup> The attempted extension of the police power to environmental control, however, encapsulates one of the problems that have arisen from home rule in Illinois. Therefore, this report will discuss only the home rule cases on environmental regulation, part of the police power.

As previously noted, a home rule unit "may exercise any power and perform any function pertaining to its government and affairs." The limitation embodied in this grant of authority—"pertaining to its government and affairs"—has caused courts deciding home rule cases a great deal of trouble. Take, for example, cases on environmental regulation. Two early cases on zoning and environmental control, for example, held ordinances of home rule local governments subordinate to the Illinois Environmental Protection Act (EPA),<sup>200</sup> a statute making protection of the environment such a paramount interest of the state government that, in the court's view, any local ordinance inconsistent with an EPA regulation must fall. They were *O'Connor v. City of Rockford*<sup>201</sup> and *Carlson v. Village of Worth*.<sup>202</sup> In another case, *Metropolitan Sanitary District of Greater Chicago v. City of Des Plaines*,<sup>203</sup> the Illinois Supreme Court held that a home rule city's ordinance banning sewage disposal plants was ineffective against the Metropolitan Sanitary District, a special district created by the state

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198. J. BANOVEZ & T. KELTY, *supra* note 193, at 10-11, is the source of the statements upon which these conclusions are based.

199. For the most recent summary of home rule litigation, see Survey, *Developments in the Law of Illinois Home Rule*, 17 J. MARSHALL L. REV. 613 (1984).

200. ILL. REV. STAT. ch. 111§, para. 100 *et seq.* (1977).

201. 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

202. 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

203. 63 Ill. 2d 256, 347 N.E.2d 716 (1976).

long before 1970. That court later held, in *City of Des Plaines v. Chicago and Northwestern Railway Co.*,<sup>204</sup> that regulation of noise pollution was a proper subject for regulation by the Environmental Protection Agency and was not within the home rule powers of the city.

Although the ordinances in most of these cases pertained to a home rule city's "government and affairs," they were struck down as infringements upon the state government's control over the environment. The question was whether control over the environment was such a state-wide concern that no local entity, even a home rule unit, could act in the field at all. The Supreme Court had suggested<sup>205</sup> in 1974 that a home rule unit could regulate environmental affairs concurrently with the legislature, so long as the local ordinance conformed to the minimum standards established by the legislature under the EPA. Concurrent jurisdiction with the state thus seemed to be the most home rule units could hope for.

That hope was realized in *Carlson v. Briceland*.<sup>206</sup> In *Carlson*, the Illinois Appellate Court held that even though the owner of a landfill had to obtain the Environmental Protection Agency's permission to construct and operate it, Cook County could also require him to obtain a special use permit under its zoning ordinance. (This was important because zoning is a chief means of regulating the environment on the local level.) The court affirmed its position of concurrent jurisdiction between the Environmental Protection Agency and home rule units in *Cook County v. John Sexton Contractors Co.*,<sup>207</sup> in which it held that Cook County must adhere to the EPA's regulations and standards when zoning land for landfills, while the EPA, in turn, must adhere to the home rule county's zoning ordinance when issuing state permits to landfill operators. Of course, landfill operators instantly found themselves in the bind of double regulation: they had to satisfy two masters.

The decade of the 1980's has seen more tests of this uneasy truce in environmental control in Illinois. In 1984, the Illinois Supreme Court held that the choice of garbage disposal facilities in southern Cook County was left to the concurrent jurisdiction of, or double

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204. 65 Ill. 2d 1, 357 N.E.2d 433 (1976).

205. *City of Chicago v. Pollution Control Board*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

206. 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1978).

207. 75 Ill. 2d 494, 389 N.E.2d 553 (1979), *appeal after remand*, 86 Ill. App. 3d 673, 408 N.E.2d 236 (1980).



regulation by, the home rule county and the EPA.<sup>208</sup> Most recently, in an opinion mixing the home rule power to tax with the home rule power to regulate the environment, an appellate court held the EPA did not prevent Chicago from imposing a seven-cent consumer tax on sales of leaded gasoline inside the city.<sup>209</sup> The purpose of the ordinance was presumably two-fold: to raise revenue and to discourage the use of harmful pollutants in a crowded urban area. The Illinois General Assembly tried to solve this problem by amending the EPA to require hearings on permits for regional landfill facilities, but since it exempted Cook, the home rule county, the problem of dual regulation still exists in that county.

As of now, therefore, Illinois still has “concurrent jurisdiction” in environmental matters, at least when Cook County is involved. Concurrent jurisdiction is, however, an uneasy truce between the legislative power and home rule power, a truce which will be tested many times in the years to come.

#### C. HOME RULE: THE POWER TO TAX

The most striking and controversial of the Illinois home rule powers is the power to impose almost any kind of tax. Only the imposition of income taxes and occupation taxes, and the requirement of licenses for revenue, are specifically forbidden to home rule units.<sup>210</sup> Home rule units can even impose taxes differentially upon different parts of the taxing area.<sup>211</sup>

The courts have gradually defined the scope of this great power. The first tax case to arise under the new home rule was *S. Bloom, Inc. v. Korshak*,<sup>212</sup> in which the Illinois Supreme Court upheld Chicago’s tax on each pack of cigarettes purchased there. After that came a succession of cases upholding Chicago or Cook County tax ordinances, including *Mulligan v. Dunne*<sup>213</sup> (Chicago’s “employer’s expense tax,” really a “doing business” tax); *Rozner v. Korshak*<sup>214</sup> (Chicago’s “wheel-tax license” on ownership of motor vehicles); *Jacobs v. City of Chicago*<sup>215</sup> (Chicago’s parking tax); and *Williams v.*

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208. *Cosmopolitan Nat’l Bank v. Cook County*, 103 Ill. 2d 302, 469 N.E.2d 183 (1984).

209. *Illinois Gasoline Dealers Ass’n v. City of Chicago*, 141 Ill. App. 3d 976, 491 N.E.2d 112 (1986).

210. ILL. CONST. art. VII, §§6(a), (e)(2).

211. ILL. CONST. art. VII, §6(1).

212. 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

213. 61 Ill. 2d 544, 338 N.E.2d 6 (1975), *cert. denied*, 425 U.S. 916 (1976).

214. 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

215. 53 Ill. 2d 421, 292 N.E.2d 401 (1973).

*City of Chicago*<sup>216</sup> (Chicago real estate transfer tax). In a sixth case, the court also upheld Cicero's municipal admission tax on amusements.<sup>217</sup>

However, the Illinois courts have drawn a firm line at taxes which affect the "government and affairs" of governments other than the government passing the ordinance. For example, they held invalid Cook County's attempt to collect a \$2.00 fee on the filing of civil cases to support the county law library, calling it a tax on those using the judiciary, a branch of the state government.<sup>218</sup> They also held invalid a Cook County ordinance permitting the collection of real estate taxes four times a year, not just twice, with the rationale that the collection of real estate taxes is an "affair" of all the units of government within Cook County, not just of the county itself.<sup>219</sup>

About ten years after home rule became effective, the courts appeared to view home rule powers a little more strictly. In *Commercial Nat'l Bank of Chicago v. City of Chicago*,<sup>220</sup> the Illinois Supreme Court held invalid a tax upon services purchased in a home rule municipality, on the grounds it was really an occupation tax that obviously had not been authorized by statute. It also held invalid Waukegan's tax on a consumer's use of telephones, electricity and gas, also on the grounds it was really an occupation tax.<sup>221</sup> On the other hand, a hotel-motel tax, a very popular way to raise funds from people who do not vote in the taxing district, was held not to be an occupation tax,<sup>222</sup> nor was Chicago's tax upon the lease or rental of personal property.<sup>223</sup> Not surprisingly, a boat mooring tax imposed upon owners of boats docking within the City was neither extra-territorial (and therefore beyond the powers of a home rule unit) nor an occupation tax.<sup>224</sup>

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216. 36 Ill. App. 3d 216, 343 N.E.2d 539, *rev'd on other grounds*, 66 Ill. 2d 423, 362 N.E.2d 1030 (1977), *cert. denied*, 434 U.S. 924 (1977).

217. *Town of Cicero v. Fox Valley Trotting Club*, 65 Ill. 2d 10, 357 N.E.2d 1118 (1976).

218. *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

219. *Bridgman v. Korzen*, 54 Ill. 2d 74, 295 N.E.2d 9 (1972).

220. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

221. *Waukegan Community Unit School Dist. 60 v. City of Waukegan*, 95 Ill. 2d 244, 447 N.E.2d 345 (1983).

222. *Springfield Hotel-Motel Ass'n v. City of Springfield*, 119 Ill. App. 3d 753, 457 N.E.2d 1017 (1983).

223. *Wellington v. City of Chicago*, 144 Ill. App. 3d 774, 494 N.E.2d 603 (1986) (as applied to taxi cab leases); *Webster v. City of Chicago*, 132 Ill. App. 3d 666, 478 N.E.2d 446 (1985).

224. *Forsberg v. City of Chicago*, 151 Ill. App. 3d 354, 502 N.E.2d 283 (1986).



These court-imposed limitations do not significantly restrict the home rule units' constitutional power to tax. The most severe limitations on their exercise of that power come instead from other sources. The economic ability of the tax base to support another tax burden is one limitation, and the political mood of the taxpayers is another, even greater, limitation. When the advocates of the new constitution campaigned for it in 1970, they did not encounter the fierce opposition to taxes they would find today. Certainly, no one wanted to pay home rule taxes, but most voters realized that there had to be alternatives to the general real property tax.

After the first blush of the novel home rule powers had passed, more and more citizens came to view home rule as the source of new taxes, not of greater efficiency in government. True, home rule units, as well as non-home rule units, used their new power to cooperate with other governments to a significant extent. However, special districts did not disappear, and, in many citizens' view, local government was only costlier, not more efficient and responsive. Perhaps mutual distrust and unwillingness to give up part of one's power are as powerful limitations on municipal powers as Dillon's Rule had ever been. The new constitution merely tried to remove the old constitutional problems facing local governments. It did not, because it could not, remove the political, economic and social problems facing local governments.

As a result, the biggest threat to the eventual success of Article VII's bold solutions to local governmental problems does not come from the courts which once imposed Dillon's Rule on Illinois local governments. It comes instead from the very citizen-taxpayers the article should serve. Local government officials have not been able to convince the taxpayers that home rule has promoted economy, efficiency and progress. Perhaps that failure arises from the perception that elected public officials may not want to achieve these economies, efficiency or progress. Although home rule units, like non-home rule units, rarely tax up to their limits, and most impose taxes far below those limits, many members of the public, insofar as they think about home rule at all, often associate "home rule" with taxes, especially taxes upon small groups singled out to pay occupation or use taxes.<sup>225</sup> To paraphrase Chief Justice Marshall, "[t]he power to tax is the power to destroy oneself." The people of any home rule unit can unmake home rule at a popular referendum, just as they can grant their county or municipality that power at a referendum.

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225. J. BANOVEZ & T. KELTY, *supra* note 193, at 11.

## IX. EDUCATION

## (Article X)

Article X—"Education" is one of the shortest articles in the 1970 Constitution, but each of its three sections has already had a telling effect on Illinois education. In considering this article, one must remember that the delegates met when both school finance and aid to parochial schools were still hotly debated constitutional and political issues. Moreover, scandals in the office of the Superintendent of Public Instruction, an elected officer loosely charged with supervision of education, had recently brought the administration of Illinois education into question.

Section 3 bans the use of "public funds for sectarian purposes," thus apparently forbidding "parochiaid" (aid to parochial private schools), one of the most volatile issues in the nation in 1970. The delegates, making a decision both politically cunning and statesman-like, left the exact language of the 1870 prohibition intact here.<sup>226</sup> This left any change in the constitutional status of parochiaid to the federal courts deciding cases on first amendment grounds. After the United States Supreme Court decided the first major case against grants to parents of children in non-public schools in 1971,<sup>227</sup> the Illinois Supreme Court followed suit and invalidated the Illinois statutes.<sup>228</sup> Thus, this issue, once so volatile in 1970, is purely a federal first amendment issue.

The battle over aid to schools has since shifted to another front: the issue of financing public elementary and secondary education. Section 1, like Section 3, is based on language lifted from the 1870 Constitution. However, it adds three significant sentences. First, it establishes that "[a] fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities." The courts have held that this language requires that any special education provided handicapped children in public school be free,<sup>229</sup> but that parents who voluntarily place a handicapped child in a private institution cannot recover their tuition payments for their child.<sup>230</sup>

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226. Cf. ILL. CONST. of 1870, art. VIII, §3, and ILL. CONST. art. X, §3.

227. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

228. *People ex rel. Klinger v. Howlett*, 56 Ill. 2d 1, 305 N.E.2d 129 (1973).

229. *Elliot v. Bd. of Educ. of the City of Chicago*, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978).

230. *Teplitz v. Mount Prospect Elementary School Dist. No. 57*, 117 Ill. App. 3d 495, 453 N.E.2d 871 (1983).



Another sentence provides: "Education in public schools through the secondary level shall be free." In 1970, almost half the Illinois adult population did not have a high school diploma. If they were all suddenly to demand a free high school education, the schools could not accommodate them either physically or financially. As yet, however, these adults seem satisfied to attend high school equivalency classes at local community colleges.

The last sentence of the section is the most controversial. It reads, "[t]he State has the primary responsibility for financing the system of public education." One question of its interpretation was whether the language is hortatory, merely stating a goal, or whether it is mandatory and judicially enforceable. In *Blase v. State*,<sup>231</sup> the Illinois Supreme Court held that it was only hortatory. The second problem of interpretation is the meaning of "primary responsibility." According to *Blase*, it apparently means that the state should provide at least 50 percent of the financial support for public schools.

Section 2 of Article X has provided the most radical change in the Education Article. It replaced the elected executive officer called the Superintendent of Public Instruction with a State Board of Education. Here, the wishes of the delegates and public coincided almost exactly: everyone favored, at least publicly, "taking politics out of education," meaning that education ought not be a partisan matter. The members of the Board are appointed from geographical areas by the Governor, subject to the advice and consent of the Senate. Their main accomplishment to date has been the fulfillment of their constitutional duty to appoint a state chief education officer, who ironically has the same title as his elected predecessor. This officer is the general supervisor of Illinois education below the university level. His duties are purely statutory, not constitutional; hence, he is a creature of both the Board and the General Assembly. Not surprisingly, neither the Board nor the chief education officer has a high profile. They are virtually unknown to the general public and even to teachers.

In a narrow sense, the Board has successfully removed education from the influence of partisan politics on the state level. The Board spawns little litigation, generates few public emotions and is not the center of the major controversies, let alone partisanship. In a broader sense, however, education is still part of partisan politics. The annual battle over the school-aid formula is fought in the General Assembly, not in the Board's meeting room, a fact that suggests how little direct

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231. 55 Ill. 2d 94, 302 N.E.2d 46 (1973).

influence over education the Board has. The Board simply has no power base, no direct authority and very low visibility. Indeed, no one, not even the Board, is responsible in a public administration sense, for education in Illinois. Perhaps the lesson to be learned from Section 2, and even from the entire Education Article, is that although goals are good, goals backed by a sound financial and political base are even better.

## X. ECONOMIC REGULATION

(Article XIII, §§ 6, 7 and 8)

The 1870 Illinois Constitution, just as most late nineteenth-century charters, attempted to regulate certain businesses. For instance, it specifically regulated corporations,<sup>232</sup> banks,<sup>233</sup> railroads<sup>234</sup> and warehouses.<sup>235</sup> By 1969, it was obvious that these areas were more appropriate subjects for legislative, not constitutional, regulation. With only two exceptions, the 1970 Constitution does not mention specific business problems. The two exceptions are banking (it addresses branch banking) and corporate charters.

Article XIII, Section 6, continues the 1870 Constitution's prohibition of special charters of private corporations, but does not continue the other and less important regulations on corporations.<sup>236</sup>

The issue of branch banking divided downstate bankers from Chicago bankers, and the delegates from those areas, almost on an exact regional basis. Since the nineteenth century, small locally-owned downstate banks have feared that, if Chicago banks were permitted to establish branches outside Chicago, they would drive the downstate banks out of business. Even in 1970, the issue called forth deeply-rooted regional prejudices and antagonisms which consumed a disproportionate share of the convention's time. Finally, the delegates decided that branch banking was primarily a matter for the legislature. The sole concession to the anti-branch banking forces was the inclusion in the constitution of a unique majority requirement for approval of branch banking by the legislature: "three-fifths of the members voting on the question or a majority of the members elected, whichever

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232. ILL. CONST. of 1870, art. XI.

233. ILL. CONST. of 1870, art. XI, §§5-8.

234. ILL. CONST. of 1870, art. XI, §§9-15.

235. ILL. CONST. of 1870, art. XIII.

236. Note, however, that the Transition Schedule, §8, requires cumulative voting for corporations organized before July 1, 1971.



is greater, in each house of the General Assembly.’’<sup>237</sup> Although the downstate bankers thought this vote requirement would make it more difficult for the legislature to approve branch banking, the efficiency of this device has yet to be tested.<sup>238</sup> No bill has reached a final vote in the legislature.

Ironically, after all that dissension, the issue has become almost moot, for two reasons. First, most Chicago banks have decided they do not want far-flung branches. The legislature has allowed banks so many “service centers” that the need for true full-service “branches” is reduced. Second, downstate banks have discovered that their real competition is federally-chartered and regulated savings and loan associations, which are immune from state prohibitions on branch banking.

A greater threat to the status quo of Illinois financial institutions may come from the legal and economic implications of the development of the electronic funds transfer system. This system would place computer terminals in stores to record a customer’s purchases in the form of debits to his bank account. In effect, the terminals would be “mini-branches” which might require a change in the branch banking laws to be valid. This technological advance, which would have made an anachronism of the 1870 Constitution’s ban of branch banking, illustrates why constitutional conventions ought not preoccupy themselves with solving the problems of the present, at the expense of allowing future generations to solve the problems of the future. Such provisions rarely, if ever, do any good, and many times they do harm by freezing the constitution to the technology at the time the constitutional provision was written.

The delegates added only one new provision in the field of economic regulation. It is Article XIII, Section 7, which establishes public transportation as a proper purpose for the expenditure of public funds. As is true of most constitutional provisions on economics, it was a response to a contemporary problem: the need to encourage mass transportation in the cities. The section merely allows the General Assembly to appropriate public funds for public transportation, including funds to be given privately-owned commuter

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237. ILL. CONST. art. XIII, §8.

238. Sometimes a bill passes that appears to be a “branch banking” bill, but the courts have held that these bills are not true “branch banking” bills. See *McHenry State Bank v. Harris*, 89 Ill. 2d 542, 434 N.E.2d 1144 (1982); *Skokie Fed. Sav. and Loan Ass’n v. Illinois Sav. and Loan Bd.*, 61 Ill. App. 3d 977, 378 N.E.2d 1090 (1978); *Security Sav. and Loan Ass’n of Hillsboro v. Griffin*, 56 Ill. App. 3d 903, 372 N.E.2d 1118 (1978).

railroads, without any fear that they are violating the Finance Article's prescription that public funds be used only for "public purposes."<sup>239</sup>

In short, the delegates to the 1970 convention learned, at least moderately well, a lesson from their counterparts at the 1869 convention and perhaps from other states: do not try to establish a constitutional system for specific businesses.

## SUMMARY

Cardozo's statement that "a constitution states, or ought to state, not rules for the passing hour but principles for an expanding future" provides a standard against which we can judge the 1970 Illinois Constitution a half-generation later. Although the delegates to the 1969-70 convention found it necessary to try to solve problems of the "passing hour" in order to obtain the voters' approval of their Constitution, they also tried to write a constitution suitable for "an expanding future."

The experience so far demonstrates the wisdom of Cardozo's statement. Some of the most controversial issues of 1970 have diminished in importance or virtually disappeared. The changing economic picture is one reason. For example, the expansion of federal savings and loan associations downstate has drastically altered the economic situation that once made branch banking so controversial.

Additionally, United States Supreme Court decisions and the 26th Amendment have rendered many other issues almost moot. Restrictions on the death penalty, suffrage for 18, 19 and 20-year-olds, aid to parochial schools and the payment of criminal fines in installments are prime examples of issues now considered relegated almost entirely to federal action. Even if the Illinois voters had rejected the 1970 Constitution, federal action would have made these changes anyway.

In two instances, appointment of judges and election of state representatives from single-member districts, failure bred hope for future success. The strong showing by those propositions at the separate side-elections in 1970 encouraged their advocates. In 1980, the single-member district forces finally succeeded. The supporters of "merit selection" or some other form of appointing judges continue their struggle. If the voters do approve the call for a convention in 1988, their primary reason for doing so will probably be to reform the judiciary. The Greylord scandal casts a long shadow, one whose edges we have not yet seen.

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239. ILL. CONST. art. VIII, §1(a).



The changes made in the text of the new constitution are too numerous to recapitulate here. Most of the minor technical changes, such as the streamlining of bill passage in the legislature, already appear to be working well. The amendatory veto is, however, less successful. It is too early to tell if the major administrative innovations, such as the Judicial Inquiry Board, the State Board of Elections, and State Board of Education, will fulfill their promise. Their records so far are not encouraging. All were responses to those felt needs of 1970 Illinois. All are bi-partisan or non-partisan commissions designed to oversee or administer a vital function of government. The needs are still here and are still felt. Whether the mechanisms for fulfilling them will prove adequate to meet the needs of an expanding future is a question which must wait for future generations to answer.

In at least three specific cases we can discern the impact of the constitution decisively. The 1971 bills granting homestead exemptions to senior citizens and incurring state debt for building highways are substantially identical to bills passed under the 1870 Constitution and declared invalid by the Illinois Supreme Court. The court declared both 1971 bills valid under the new constitution. After many tribulations, the ad valorem personal property tax ceased in 1979.

In several other areas, we can see the unfulfilled dreams of the drafters of the constitution. It would have been hard to improve upon the text they wrote—their intent is clear—and yet, there has been a failure to realize these dreams. The anti-discrimination provisions, the entire Finance Article, and many of the provisions attempting to improve the legislative process and the judiciary are as yet unrealized. Yet they are good, forward-looking provisions of which all Illinoisans can be proud.

Each of the three previous Illinois constitutions served the state reasonably well for a time. Eventually, however, the “rules for the passing hour” each constitution had laid down stymied later generations trying to solve the problems of the “expanding future.” As a result, the people changed their constitutional framework in 1848, 1870 and 1970. The fourth charter has given Illinois a sound constitutional basis for today, for the first half a generation of its existence. It has met well the test of the passing hour. The real test, however, is whether it will meet the test of providing a sound constitutional basis for the expanding future.

In judging the effectiveness of the 1970 Constitution, in 1988, when the people must decide to call a convention to reconsider the charter, or, indeed, at any time in the future, it would behoove us to remember the last words of the 1969-70 Constitutional Convention’s address to the People of Illinois:

In a state so diverse as Illinois, only the spirit of compromise has made it possible for many problems to be solved. The Convention asks the People to view its product in the same spirit—with the idea that while it is not in every respect ideal from a given point-of-view, it is from any vantage point far better suited than is the Constitution of 1870 to serve the future needs of the State.<sup>240</sup>

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240. RECORD OF PROCEEDINGS, *supra* note 2, Vol. VII, at 2678.



# The Power of State Constitutions in Protecting Individual Rights\*

THE HONORABLE STANLEY MOSK\*\*

There may appear to be a species of heresy in mentioning alternatives to the United States Constitution during the period when we are celebrating the bicentennial of that remarkable document. My only response to any such criticism is that human liberty is so fundamental that every avenue for its preservation must be explored. As Justice Jackson wrote, “[w]e can afford no liberties with liberty itself.”<sup>1</sup>

Many trees have been felled to make the paper, and much ink is being spilled, to provide the recent published articles extolling the undoubted virtues of the United States Constitution. This is good. I applaud the inflated interest in our great charter. Indeed, one hopes some of the homage is heard and understood in a number of relatively dark places in our nation.

There are times, however, when dependence on the United States Constitution does not meet all the convolutions of a problem. Under those circumstances one may find it expedient to look up to international instruments, or down to state constitutions. Since I have been asked to discuss the latter, I will not dwell at any length on the former, except to note that there have been times, and there will be more, when courts will rely on international documents that have the force of treaties for authority to protect individual rights.

Let us discuss the trend in state constitutional law. In so doing my comments will be somewhat of a potpourri. Even if I were presumptuous enough to believe I could, of necessity I will have no opportunity to delve into any aspect in depth.

At the onset let me be realistic and recognize there are some ominous signs in the field of state constitutional law. Rising crime rates, particularly violent crime, is not the most healthy environment in which to suggest the virtue of expanding individual rights. A

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\* This article is drawn from an address given to a joint meeting of the Illinois State Bar Association and the Illinois Judge's Association in Chicago, Illinois on November 12, 1987.

\*\* Justice of the California Supreme Court

1. United States v. Spector, 343 U.S. 169, 180 (1952).

heinous assault, forcible rape or child molestation arouse little public compassion. In such circumstances some state legislators yield to public clamor and seek to provide for the accused only the barest minimum of basic rights. The minimum, of course, is in general what the federal constitution and the United States Supreme Court provide.

Not only do legislators respond to what they perceive to be a public demand, but in those states which have direct legislating by the people—through the initiative—often there is such direct action. We in California had that experience when a measure, known as Proposition 8, was drafted by emotionally-charged groups, placed on the ballot, given the seductive title of “Victims’ Bill of Rights,” and, well, who could oppose rights for victims? That the measure turned the clock back on decades of thoughtful legislation and judicial interpretation was given little, if any, consideration.

Yet this 200th anniversary year, as we observe the masterful product and intent of our constitutional architects, we have a duty to contemplate their concept of a federal republic. Basically, they declared time and again that they were creating a national government of limited powers, that it was the states which had the duty to protect the well-being of individuals.

True, a Bill of Rights—ten amendments—was added shortly after 1787 at the insistence of those who recalled the tyranny of the colonial masters and would not subscribe to the Constitution unless the criminally accused were assured due process and other minimum guarantees. But at no time did the framers place a limit, or a cap, on the protections the states could provide their citizens. Indeed, the implication was clear that they fully anticipated the states would act. As Justice Brandeis put it many years later, the states may be political science laboratories, to experiment, to improvise, to test new theories. If a state experiment succeeds, others may follow. If it fails, only one of 50 states is affected.<sup>2</sup>

One lesson we can learn is this: our founding fathers had faced violence in the revolutionary war, just as we face violence in the streets today; our founding fathers experienced quartering of soldiers in their homes and rape of their wives and daughters, just as we experience invasion of our homes by robbers, burglars and rapists; our founding fathers had their property taken by force without representation, just as we have our property forcibly taken by marauders.

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2. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).



Yet our founding fathers thought and spoke in terms of protecting not merely all citizens by a requirement of due process, but primarily those who are accused of crime. Yes, they were concerned about victims. But they conceived of the accused as the potential victim of government, thus to him went the guarantee of rights. But, as I shall indicate, the guarantees were only the bare minimum.

Take, for example, the right of privacy. In courts throughout the land, that somewhat elusive concept is being urged and generally accepted. It must be placed high on any agenda.

I find it significant that in many respects state constitutions protect individuals more expansively than does the United States Constitution. For example, although the High Court has on occasion found privacy to be among so-called penumbral rights, there is no specific guarantee contained in the federal Bill of Rights. Article I, section 1, of the California Constitution declares that among the inalienable rights are: "pursuing and obtaining safety, happiness, and privacy." That is typical of a number of other state constitutions.<sup>3</sup>

For a scenario on this subject, let me observe that a police officer or a public prosecutor may walk into a bank and, with no authority of process, demand to examine the bank records of a named individual or corporation. No constitutional violation, says the United States Supreme Court in *United States v. Miller*.<sup>4</sup> But some states have pointed out that one's cancelled checks, loan applications, and other banking transactions are a mini-biography, that one reasonably expects his bank records to be used only for internal bank processes and therefore an examination of them violates the state constitutional right of privacy, unless the records are obtained by a warrant or subpoena.<sup>5</sup> Does one reasonably expect privacy in his credit card records, or his unlisted telephone calls? Tune in later.

To most of us, learning and knowledge are our most prized possessions. Yet the United States Supreme Court has never recognized education to be a fundamental right. Indeed, in *San Antonio School Dist. v. Rodriguez*<sup>6</sup> the court in 1971 specifically held that education is not a fundamental right, and it has never retreated from that position. Just last year it reached a similar conclusion in *Papasan v. Allain*<sup>7</sup>. The court has come no closer than *Plyler v. Doe*<sup>8</sup> in which it

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3. See, e.g., ILL. CONST. art. I, § 6.

4. 425 U.S. 435, 440 (1976).

5. *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

6. 411 U.S. 1 (1973).

7. 106 S. Ct. 2932 (1987).

8. 457 U.S. 202 (1982).

applied a higher scrutiny standard to a statute that denied basic education to alien, undocumented school-age children, but even under that standard it reiterated that education is not a fundamental right under the U.S. Constitution.

Contrast that result with the growing number of states, since Massachusetts provided the first public school system in 1647, that have recognized the inherent value of public education. California, in its celebrated *Serrano v. Priest*<sup>9</sup> case openly broke away from the high court reticence and firmly declared that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest."<sup>10</sup>

Connecticut, Michigan, Wyoming, Arizona, Mississippi, Washington, Wisconsin and West Virginia have reached the same fundamental right conclusion.<sup>11</sup>

High on the constitutional agenda in the next few years will be *Miranda*,<sup>12</sup> and what, if anything, to do about it. I note the Supreme Court has taken over the *Patterson*<sup>13</sup> case from Illinois, but the issue there appears to be whether *Miranda* gives enough protection to a defendant, not too much.

Attorney General Meese has taken an extreme anti-*Miranda* position, rejecting the right of a suspect to terminate interrogation either by saying he wants to do so or that he desires to have the advice of a lawyer. Instead, the recent report of his office calls such persons uncooperative suspects and believes the police should be able to undertake persuasion to induce the suspect to change his mind and talk—translation: to confess.

There is a long list of doubters that this effort of the Attorney General will succeed. The overruling of precedent prevailing for two decades or more is a quiet, slow, patient process. It is usually accomplished by steps, often in a succession of cases. It is seldom done by press release.

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9. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

10. *Id.* at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

11. *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Milliken v. Green*, 389 Mich.1, 203 N.W.2d 457 (1972); *Washakie Co. School Dist. v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Clinton Municipal Separate School Dist. v. Byrd*, 477 So.2d 237 (Miss. 1985); *Seattle School District v. Washington*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

12. *Miranda v. Arizona*, 384 U.S. 436 (1966).

13. *Illinois v. Thomas*, 116 Ill. 2d 290, 507 N.E.2d 843 (1987), *cert. granted sub nom.*, *Patterson v. Illinois*, 108 S. Ct. 227 (1987).



In short, I believe, to paraphrase Mark Twain, the death of *Miranda* is greatly exaggerated. But assume I am wrong. After all, reversals of former precedent are not unprecedented. Remember *Lochner v. New York*,<sup>14</sup> *Pace v. Alabama*,<sup>15</sup> *Plessy v. Ferguson*,<sup>16</sup> *Minersville v. Gobitis*,<sup>17</sup> *Swain v. Alabama*,<sup>18</sup> and others.

Bear in mind that when *Miranda* was announced, many of the states were reluctant to accept it. Some were dragged kicking and screaming into conformity. But conform they did. The question will be, if *Miranda* expires, will the states revert to their pre-*Miranda* policy of anything-goes-at-the station house, or will they choose to insist upon some form of *Miranda*-type warning under state constitutional authority?

I am convinced that unless the High Court should rule a *Miranda* warning is absolutely forbidden—which seems utterly inconceivable—many, if not most, states will adhere to the state rules which they adopted to conform to *Miranda*. It has taken two decades, but law enforcement officers in the states have become reconciled to giving appropriate warnings to suspects. And trial judges understand they must reject statements obtained from defendants who were not warned. Many of the state decisions have been based on state constitutions.

For example, in *Harris v. New York*<sup>19</sup> the Supreme Court permitted statements obtained in violation of *Miranda* to be used for impeachment purposes. A number of states have held that if a statement offends *Miranda*, it is useless for all purposes. Here is a forthright declaration of state independence in *People v. Disbrow*:<sup>20</sup>

We therefore hold that the privilege against self-incrimination of article I, section 15, of the California Constitution precludes use by the prosecution of any extrajudicial statement by the defendant, whether inculpatory or exculpatory, either as affirmative evidence or for purposes of impeachment, obtained during custodial interrogation in violation of the standards declared in *Miranda* and its California progeny. Accordingly, we . . . declare that *Harris* is not persuasive authority in any state prosecution in California.<sup>21</sup>

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14. 198 U.S. 45 (1905).

15. 521 F.2d 812 (5th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976).

16. 163 U.S. 537 (1896).

17. 310 U.S. 586 (1940).

18. 380 U.S. 202 (1965).

19. 401 U.S. 222 (1971).

20. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

21. *Id.* at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

To the same effect is *State v. Santiago*,<sup>22</sup> a Hawaiian case, and *Butler v. State*,<sup>23</sup> a Texas case. Note this quotation from *Butler*:

*Harris*, of course, in no way obligates [state courts] to overturn prior decisions as a matter of state criminal procedure. . . . Therefore, we cannot agree with the [prosecution's] contention despite the natural temptation to rush to accept the *Harris* rationale. The beauty is only skin deep.<sup>24</sup>

Another hole was dug in the exclusionary rule by the United States Supreme Court in 1984. In *United States v. Leon*<sup>25</sup> the Court announced the "good faith" exception to the exclusionary rule: suppression of evidence from the prosecution's case-in-chief is, as a matter of federal law, appropriate only if the officers were dishonest in preparing their affidavit for a search warrant.

The good faith doctrine was expanded to include reasonableness in *Maryland v. Garrison*.<sup>26</sup> There the Baltimore police actually invaded the wrong apartment, but in a 6-3 vote, Justice Stevens held for the court that the validity of the search depended on whether the officers' failure was "objectively understandable and reasonable."<sup>27</sup>

Several state courts, on state constitutional grounds, have declined to follow *Leon* and probably will do so as to *Garrison*. All the cases to date involved searches conducted pursuant to a warrant later determined to be invalid. Let me enumerate a few.

In *State v. Novembrino*,<sup>28</sup> the court, in a lengthy opinion, refused to follow *Leon* because: (1) its long run effect will be to undermine the integrity of the warrant process by diminishing the quality of evidence presented in search warrant application; (2) it "will ultimately reduce respect for and compliance with the probable-cause standard"; (3) it is inconsistent with the state constitution as interpreted; (4) there was no evidence that the criminal justice system was impaired by the requirement of probable cause; and (5) there is no satisfactory alternative to the exclusionary rule.<sup>29</sup>

The New York court in *People v. Bigelow*<sup>30</sup> declined to follow *Leon* because it: (1) frustrates the exclusionary rule's purposes; (2)

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22. 53 Hawaii 254, 492 P.2d 657 (1971).

23. 493 S.W.2d 190 (Tex. Crim. App. 1973).

24. *Id.* at 198.

25. 468 U.S. 897 (1984).

26. 107 S. Ct. 1013 (1987).

27. *Id.* at 1019.

28. 105 N.J. 95, 519 A.2d 820 (1987).

29. *Id.* at , 519 A.2d at 854-56.

30. 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).



places a premium on the illegal police action; and (3) provides a positive incentive for “others to engage in similar lawless acts.”<sup>31</sup>

The Michigan court in *People v. Sundling*<sup>32</sup> rejected *Leon* because: (1) the magistrate’s decision would, as a practical matter, be insulated from appellate review; (2) the exception would result in increased illegal police activity; and (3) the Court’s claim that the exclusionary rule is not working is not supported—indeed, is contradicted—by the evidence.<sup>33</sup>

In *Stringer v. State*,<sup>34</sup> a Mississippi case, Justice Robertson declared that (1) the exclusionary rule is necessary so that it is “assur[ed] that issuing magistrates take seriously their responsibilit[y]” to ensure that people are free of unconstitutional searches; (2) if the exclusionary rule “ain’t broke, why fix it?”; and (3) that there is “neither a need for change nor a reasonably effective and available alternative”.<sup>35</sup> In addition, Justice Robertson suggested that *Leon* undermines the integrity of the judicial process.<sup>36</sup>

The Wisconsin court in *State v. Grawein*<sup>37</sup> refused to employ *Leon* because the state constitution and prior Wisconsin Supreme Court decisions interpreting it hold that the receipt into evidence of the fruits of an invalid search warrant violates the defendant’s state constitutional rights.<sup>38</sup>

It would appear that if state courts can find other ways of rejecting *Leon* and retaining the rule of excluding illegally obtained evidence, they will do so.

Another significant federal-state conflict arises over the use of a defendant’s pretrial silence. All jurisdictions agree that, as held in *Griffin v. California*,<sup>39</sup> the silence of a defendant, under a claim of privilege against self-incrimination, may not be admitted in the prosecution’s case-in-chief. But there is some divergence as to the use of such silence for impeachment purposes.

*Jenkins v. Anderson*<sup>40</sup> approved the prosecutor’s use for impeachment purposes of a defendant’s failure to surrender for two weeks,

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31. *Id.* at 424, 488 N.E.2d at 458, 497 N.Y.S.2d at 637.

32. 153 Mich. App. 277, 395 N.W.2d 308 (1986).

33. *Id.* at 292, 395 N.W.2d at 314.

34. *Stringer v. State*, 491 So.2d 837 (Miss. 1986) (Robertson, J., concurring).

35. *Id.* at 849-51.

36. *Id.* at 850.

37. 123 Wis. 2d 428, 367 N.W.2d 816 (1985).

38. *Id.*

39. 380 U.S. 609 (1965).

40. 447 U.S. 231, 235-38 (1980).

when he claimed on the stand that the killing was in self-defense. Most state cases agree, on a theory that the silence must amount to an invocation of Fifth Amendment rights in order to be excluded.

After arrest, however, the dichotomy depends on whether *Miranda* warnings have been given. If so, *Doyle v. Ohio*<sup>41</sup> controls. Obviously it would be unconscionable to penalize a defendant for remaining silent after he has been told by the authorities that he has a right to refuse to talk.

However, if *Miranda* warnings have not been given, the U.S. Supreme Court held in *Fletcher v. Weir*<sup>42</sup> that a defendant's constitutional rights are not violated by permitting him to be cross-examined about his pre-*Miranda* silence. The court reasoned that because there were no affirmative assurances as a result of the failure to give a *Miranda* warning, no fundamental unfairness would arise from allowing the defendant's silence to be used for impeachment purposes.

Courts in Washington, Connecticut, Alaska, New Jersey, Pennsylvania, Texas and California reach a contrary conclusion.<sup>43</sup> The latter relied entirely on the state Constitution.<sup>44</sup>

Several of the foregoing state cases feared that to allow the defendant's silence to be used for any purpose would invite the police to dispense with *Miranda* warnings. They also expressed concern that silence used for impeachment would likely be used by the jury in determination of guilt.

A conflict is inevitable between national and state standards in the field of obscenity. Under the U.S. Supreme Court rubric from *Miller v. California*,<sup>45</sup> material is obscene if (1) it depicts sexual conduct in a patently offensive manner, (2) the average person, applying contemporary state standards, would find that it, taken as a whole, appeals to a prurient interest in sex, and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.<sup>46</sup>

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41. 426 U.S. 610, 616-20 (1976).

42. 455 U.S. 603 (1982).

43. Connecticut: *State v. Leecan*, 198 Conn. 517, 504 A.2d 480 (1986) (relying on principles of evidence rather than on the Connecticut Constitution); Texas: *Sanchez v. State*, 707 S.W.2d 575 (Tex. Crim. App. 1986); Washington: *State v. Davis*, 38 Wash. App. 600, 686 P.2d 1143 (1984); Alaska: *Nelson v. State*, 691 P.2d 1056 (Alaska Ct. App. 1984); Pennsylvania: *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982); New Jersey: *State v. Deatore*, 70 N.J. 100, 358 A.2d 163 (1976).

44. *People v. Jacobs*, 158 Cal. App. 3d 740, 751, 204 Cal. Rptr. 849, 857 (Cal. App. 2d Dist. 1984).

45. 413 U.S. 15 (1973).

46. *Id.* at 23-25.



Recently in the case of *State v. Henry*<sup>47</sup> a proprietor of an adult bookstore was convicted after his entire inventory was seized in a police raid. The Oregon Supreme Court declared that its state Constitution was written by “rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people’s views of morality on the free expression of others.”<sup>48</sup> Oregon’s pioneers intended to protect freedom of expression “on any subject whatever,” including the subject of sex. In rejecting the *Miller* rule, the court declared “[i]n this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered ‘obscene.’”<sup>49</sup>

There is no better example of how the states can be laboratories for development of the law than the fate of *Swain v. Alabama*.<sup>50</sup> In that case the majority of the United States Supreme Court held that there could be no limitations whatever on the exercise of peremptory challenges.

A modest concession was made if a defendant could demonstrate a long pattern of discriminatory use of the challenges.

This, of course, was an utter impossibility. How could a defendant, while jury selection was underway, demonstrate that the prosecutor had employed discriminatory tactics in x-number of previous cases in which, of course, this defendant was not involved and in which the racial characteristics of previous jurors was not recorded?

California specifically rejected *Swain* in a case entitled *People v. Wheeler*.<sup>51</sup> The state court held that there could be a limitation on peremptory challenges if they were employed for a discriminatory purpose. The method of ascertaining the systematic exclusion of a cognizable group was described in detail, and if a prima facie case of discrimination was evident, the trial judge could call on the prosecutor to explain each of his challenges. If he flunked that test, the entire jury panel was to be excused and a new panel brought in to start the proceedings over. Massachusetts adopted much the same procedure<sup>52</sup> and a number of other states have acted similarly.

Lo and behold, last year in *Batson v. Kentucky*<sup>53</sup> the United States Supreme Court admitted that *Swain* is not workable, and

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47. 302 Ore. 510, 732 P.2d 9 (1987).

48. *Id.* at 523, 732 P.2d at 16.

49. *Id.* at 525, 732 P.2d at 18.

50. 380 U.S. 202 (1965).

51. 22 Cal. 3d 258, 583 P.2d 748 (1978).

52. *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979).

53. 476 U.S. 79 (1986).

finally conceded that the use of peremptory challenges for racially discriminatory purposes must not be condoned. This suggests the old adage: wisdom too often never comes, so one ought not to reject it merely because it comes late. It also demonstrates how state courts can have a significant effect on the pattern of the law, even federal-made law.

Motor vehicles present a particular problem as courts at every level grapple with the boundaries of permissible searches.

If a person is stopped by a police officer for a simple traffic violation, the motorist may find himself subjected to a full body search and his vehicle searched. No constitutional violation, says the United States Supreme Court in *United States v. Robinson*<sup>54</sup> and *Gustafson v. Florida*.<sup>55</sup> But Hawaii<sup>56</sup> and other states have found such police conduct offensive to state constitutional provisions unless the officer has articulable reasons to suspect illegal conduct other than the minor traffic infraction.

I must add that most courts have difficulty in ascertaining the limits, if any, of automobile searches in light of more recent federal opinions. If a vehicle is stopped on mere suspicion, may the car be searched without a warrant? The glove compartment? The trunk? A closed container in the trunk? And if the vehicle is a van with a bed, kitchen, closet, curtained windows, etc., does it have the qualities of an automobile because it is mobile, or is it entitled to the protections of a home because one lives in it? These are areas in which the states are likely to reach independent and varying conclusions.

The right of police to inventory the contents of an impounded motor vehicle results in another conflict between United States Supreme Court and state court decisions. In *South Dakota v. Opperman*<sup>57</sup> the High Court held inventory searches of automobiles to be consistent with the Fourth Amendment. And in the recent case of *Colorado v. Bertine*<sup>58</sup> the court justified the inventory as a means to protect the police and garage attendants from subsequent false claims of theft.

Colorado, however, reached a different conclusion<sup>59</sup> as has California.<sup>60</sup> Since property could conceivably disappear prior to or during the inventory process, both states believed a simpler solution would

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54. 414 U.S. 218 (1973).

55. 414 U.S. 260 (1973).

56. *Hawaii v. Kaluna*, 55 Hawaii 361, 520 P.2d 51 (1974).

57. 428 U.S. 364 (1976).

58. 107 S. Ct. 738 (1987).

59. *People v. Bertine*, 706 P.2d 411 (Colo. 1985).

60. *People v. Mozzetti*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).



be to merely lock and seal the automobile in a secure parking facility. The *Mozzetti* case was particularly egregious: the woman was not a criminal suspect, she had been in an automobile accident and had been taken to the hospital. It is difficult to justify the police searching her car trunk and examining a closed suitcase on the back seat, all on an inventory theory.

My favorite federal-state dichotomy is in the history of a not uncommon factual situation: a small, orderly group of citizens undertakes to pass out leaflets, or to solicit signatures on petitions, in a privately owned shopping center. The shopping center owners seek to prohibit that activity.

Obviously there is a built-in tension between two constitutional guarantees. On the one hand the citizens assert their right of freedom of speech, and the right to petition their government for a redress of grievances. On the other hand, the shopping center owner asserts his right to control his private property and to exclude all non-business related activity. In that conflict which right is to prevail?

In 1970, the Supreme Court of California held in *Diamond v. Bland*<sup>61</sup> that unless there is obstruction or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly free speech and petitioning activities on the premises of shopping centers open to the public. This, of course, is subject to reasonable time, place and manner restrictions.

On four occasions the shopping center owner sought certiorari and rehearing from denial of cert., and in each instance he was rebuffed by the High Court, with no votes noted to grant.<sup>62</sup> We had every reason to believe *Bland* was acceptable law.

Two years later, however, the Supreme Court took over an almost identical case from Oregon, and in *Lloyd v. Tanner*<sup>63</sup> held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center.

Back to the California Supreme Court came the *Diamond v. Bland* owners and asked to be relieved from the previous orders. A 4-3 majority of our court agreed we were bound by *Lloyd v. Tanner*.<sup>64</sup>

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61. *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), cert. denied, 402 U.S. 988, reh'g denied, 404 U.S. 874 (1971), reh'g denied, 405 U.S. 981, reh'g denied, 409 U.S. 897 (1972).

62. *Id.*

63. 407 U.S. 551 (1972).

64. *Diamond v. Bland*, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

At this point I shifted gears. In our original opinion we had relied on the First Amendment to the United States Constitution, and to such cases as *Marsh v. Alabama*<sup>65</sup> and *Amalgamated Food Employees Union Local 590 v. Logan Plaza*.<sup>66</sup>

The second time around I urged the same result under "unmistakable independent non-federal grounds upon which our earlier opinion could have been based."<sup>67</sup> But for the moment a majority of our court retained consistency with federal law.

I said "for the moment," for five years later in 1979, a new majority of our court decided in *Robins v. Pruneyard*<sup>68</sup> that the free speech provisions of the California Constitution offer "greater protection than the First Amendment now seems to provide."<sup>69</sup>

The United States Supreme Court granted certiorari in *Robins v. Pruneyard*,<sup>70</sup> and I must confess we sensed doom to our theory of state constitutionalism. But, to our delight, the Supreme Court agreed with us, 9-0.<sup>71</sup> Justice Rehnquist wrote the opinion that declared the reasoning in *Lloyd v. Tanner* "does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution . . . ."<sup>72</sup>

No doubt there is a growing interest in true federalism. There was a time when states' rights were associated with Orval Faubus and George Wallace barring the entrance of Blacks to public schools. We are long past that confrontational period.

Today states' rights are associated with increased, not lessened, individual guarantees. There is every indication, particularly since *Pruneyard*, that the Rehnquist court will defer to the states when they rely on state constitutional provisions. Thus I urge you to constantly look to your state Constitution, to its history and to its provisions.

Don't let anyone tell you that state Constitutions are merely redundant, even when their text is similar to that contained in the federal Constitution. Bear in mind that state charters did not get their inspiration from the United States Constitution. It was the converse: the framers of the federal charter adapted almost all of the Bill of Rights from the charters of the original states.

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65. 326 U.S. 501 (1946).

66. 391 U.S. 308 (1968).

67. See *supra* note 60.

68. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

69. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 861.

70. 447 U.S. 74 (1980).

71. *Id.*

72. *Id.* at 81.



At the top of any agenda is a review of James Madison's words in *The Federalist* (No. XLV):

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State.<sup>73</sup>

Sound policy 200 years ago. Sound policy today.

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73. *THE FEDERALIST* No. 45, at 292-93 (J. Madison) (Mentor ed. 1961).





# From Judicial Election to Merit Selection: A Time for Change in Illinois

NANCY FORD\*

## I. INTRODUCTION

Several issues concerning judicial reform captured the attention of the convention delegates, the media and the public during the 1969 Illinois Constitutional Convention. Most prominent was the question of whether judges should continue to be elected or instead should be appointed by the Governor after being nominated by a judicial nominating commission. Unable to resolve the issue, convention delegates decided to let the voters of the state choose between the two major alternatives. Temporary resolution of the dispute came in the special election on the proposed Illinois Constitution of December 15, 1970, where 50.2% of the voters supported a revised election system over a system of judicial appointments.<sup>1</sup> The question was not, however, put to rest.

The debate over the method of selecting judges remains one of the most controversial issues in Illinois government. Merit selection plans have been unsuccessfully introduced as bills or joint resolutions in almost every session of the General Assembly since 1971.<sup>2</sup> Other bills would have changed the current method of selection to one of non-partisan nomination of judges followed by their election.<sup>3</sup> Many of the bills would have led to a proposed constitutional amendment to be voted upon in a referendum by the general public.

Both proponents and opponents of a proposed appointive system are mobilizing for an anticipated legislative fight this year. A revi-

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1. R. COHN, *TO JUDGE WITH JUSTICE: HISTORY AND POLITICS OF ILLINOIS JUDICIAL REFORM* 141 (1973).

2. *See, e.g.*, H.B. 3269, 83rd Ill. Gen. Assembly, 2d Reg. Sess. (1984); H.B. 2630, 81st Ill. Gen. Assembly, 1st Reg. Sess. (1979); H.B. 2143, 79th Ill. Gen. Assembly, 1st Reg. Sess. (1975); S.B. 1441, 77th Ill. Gen. Assembly, 2d Reg. Sess. (1972).

3. *See, e.g.*, H.B. 3761, 77th Ill. Gen. Assembly, 2d Reg. Sess. (1972).

sionist coalition of civic, legal, academic, business persons and public officials was formed, calling itself "Project Merit Selection of Judges." Sixty-seven chief executive officers of companies in Illinois have written a letter to state legislators urging the approval of merit selection.<sup>4</sup> The Illinois State Bar Association developed its own appointment proposal.<sup>5</sup> A special task force was created by the Governor, with representation from the Illinois Supreme Court, the Illinois Bar Association, Chicago Bar Association, Chicago Council of Lawyers, the General Assembly, Mothers Against Drunken Driving, the Illinois Manufacturers Association, and Arthur Young and Company. It came up with a new proposal for merit selection at the end of last year which it believes will merge the differing proponent views.<sup>6</sup> On the other side are the Cook County Bar Association, a group comprised of nearly 700 black attorneys,<sup>7</sup> numerous Cook County Democratic regulars and downstate Republicans, and several influential elected officials who have not as yet found a merit system they can endorse.<sup>8</sup> If proponents fail to secure the approval of three-fifths majorities in both chambers of the General Assembly, it is logical to expect they will carry on the battle at a 1989-90 Constitutional Convention, should one be held.<sup>9</sup> One commentator has even suggested that a constitutional convention be called for the sole purpose of changing the method of judicial election.<sup>10</sup>

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4. *Group Begins Big Push for Merit Selection*, Chi. Daily L. Bull., Feb. 10, 1987, at 14, col. 4.

5. *ISBA Approves New Merit Selection Plan*, Chi. Daily L. Bull., June 22, 1987, at 1.

6. *Task Force Urges Amendment to Let Governor Pick Judges*, STATE J. REG., Dec. 5, 1987, at 9.

7. *Women's Bar Group Hears Merit Selection Arguments*, Chi. Daily L. Bull., Feb. 19, 1986, at 1.

8. Kenney, *Constitutional Politics: Writing the Executive, Legislative and Judicial Article*, ILLINOIS POLITICAL PROCESS AND GOVERNMENTAL PERFORMANCE 54-55 (E. Crane ed. 1980). *See also supra* note 6.

9. *See supra* note 6. In order for a proposal to become part of the Constitution, the proposal would need a three-fifths affirmative vote in each chamber of the legislature, as well as ratification by either three-fifths of the voters voting on the questions or a majority of all of those voting in the next general election (November, 1988). ILL. CONST. art. 14, § 2. Under article 14, § 1(b) of the Constitution of 1970, the question of whether to call a constitutional convention must be sent to the voters at least every twenty years. Since the last such question, resulting in the present constitution was submitted to the voters in 1968, the referendum on this issue must be put to the voters in November, 1988. If the voters support it, a constitutional convention will be held. ILL. CONST. art. 14, § 1(b).

10. *A Con-Con For Merit Selection*, Chi. Law. Dec., 1987, at 16.



This article reviews the historical development of the judicial election system in Illinois, traces events since the adoption of the 1970 Constitution, and reviews current proposals for change. The major arguments given in support of continuation of partisan judicial election are analyzed. Illinois' judicial retention process is discussed in relationship to both elective and appointive selection systems. The author concludes that a representative merit selection method would be better than Illinois' current election method.

## II. JUDICIAL SELECTION BEFORE THE 1970 CONSTITUTION

From the time Illinois became a state in 1818 until a new judiciary article to the Illinois Constitution went into effect on January 1, 1964, the judicial system operated in what had been called "[h]aphazard order or marginal chaos."<sup>11</sup> The Constitution of 1818 had established only a supreme court and delegated authority to the legislature to create lower courts. The 1848 Constitution set up circuit courts, county courts and justice of the peace courts in addition to the supreme court. The General Assembly was left with authority to establish courts of uniform jurisdiction in cities.<sup>12</sup> In 1870 a new constitution continued expansion of the courts. In addition to existing courts, it provided for the creation of an appellate court, police magistrates, and the superior and criminal courts of Cook County. The General Assembly was also empowered to set up probate, city and town courts.<sup>13</sup> Eventual dissatisfaction with the justice of the peace and police magistrate courts led to an amendment of the judicial article of the constitution in 1904 to limit their jurisdiction in Cook County to areas outside of Chicago.<sup>14</sup> But a complex judicial department with a myriad of trial courts still remained.

Under the 1818 Constitution, all judges were appointed by, and could be removed by, the General Assembly. Because of the control the General Assembly could exert, all the judges, even the supreme court judges, lacked any real independence. This judicial inadequacy was a major cause for drafting the 1848 Constitution.<sup>15</sup> Since the

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11. R. COHN, *supra* note 1, at 3.

12. *Id.* at 3-4.

13. ADMIN. OFFICE OF THE ILL. CTS., 1971 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 8 (1971) [hereinafter SUPREME COURT ANNUAL REPORT, 1971].

14. ADMIN. OFFICE OF THE ILL. CTS., A SHORT HISTORY OF THE ILLINOIS JUDICIAL SYSTEMS 16 (1976) [hereinafter ILLINOIS JUDICIAL SYSTEMS].

15. *Id.* at 8-10.

adoption of the 1848 Constitution, judges were elected, and until recently re-elected, in partisan contested elections.<sup>16</sup>

By 1950, the judicial article of the 1870 Constitution, as amended in 1904, was no longer workable. The multiplicity of courts which had served Illinois' primarily rural population had become unmanageable with industrialization and the growth of Illinois cities.<sup>17</sup> Attempts were made to amend the judicial article beginning in 1951. The Illinois State and Chicago Bar Associations created a "Joint Committee on the Judicial Article" to spear-head the drive. The committee consisted of practicing lawyers, judges and legal educators. It produced a draft of the article in 1952, which was then introduced and considered in assembly sessions in 1953, 1955, 1957 and 1961.<sup>18</sup>

A new method of judicial selection was an essential element of the proposal. Proponents supported what has been referred to as a "merit plan of selection and tenure."<sup>19</sup> Its principal features were:

- (1) the nomination of a slate of candidates by non-partisan commissions having both lawyers (or judicial or a combination of lawyer-judicial members) and public (nonlawyer) members;
- (2) appointment by the governor from the nominee list submitted by the commission, and (3) an initial, short probationary term of judicial service by the appointee followed by a nonadversary elections upon the expiration of his term of office.<sup>20</sup>

By 1957, it appeared that there was sufficient public and professional demand for reform that it could no longer be ignored. Propo-

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16. R. COHN, *supra* note 1, at 15. One exception was the appellate court. Under the 1870 Constitution, appellate court judges were appointed by the supreme court from among the circuit courts and the Superior Court of Cook County. ILLINOIS JUDICIAL SYSTEMS, *supra* note 14, at 13-15.

17. SUPREME COURT ANNUAL REPORT, 1971, *supra* note 13. As early as 1859, special courts were established to meet the needs of growing cities. They shared jurisdiction with existing courts. In Cook County, for instance, by 1962, there were 208 courts. They included the circuit court, the superior court, the family court, criminal court, probate court, county court, the municipal court of Chicago, 23 city, village, town and municipal courts, 75 justice of the peace courts, and 103 police magistrate courts. To complicate the problem, there was no administrative authority to unify, coordinate and supervise them. ILLINOIS JUDICIAL SYSTEMS, *supra* note 14, at 19.

18. R. COHN, *supra* note 1, at 10.

19. *Id.* at 17.

20. *Id.* This plan is generally known as the "Missouri Plan," because that state was the first to adopt all of its elements in its Constitution in 1940. It is also known as the American Bar Association Plan and the Non-partisan Commission Plan. *Id.* at 17 n.1.



nents of reform, however, were dealt a couple of serious set-backs. First they were forced into a compromise agreement with a coalition of political leaders. In order to get the General Assembly to accept the structural and organizational court reforms that they advocated, the proponents had to agree to preserve the political adversary system of electing judges. Even with these concessions, the legislatively adopted reforms were narrowly defeated in a 1958 statewide referendum.

It was not until the early 1960's that enough support for change could be mobilized. An expanded Joint Committee on the Judicial Article of the Illinois State and Chicago Bar Associations led the way. Committees of the General Assembly were formed to provide broader professional representation on the question. Proponents and opponents of reform wooed influential organizations. "Policy disputes between the political forces and bar association leadership were frequent and bitter. The public was bombarded with the pros and cons of the issues, and press coverage of all forms helped crystallize public attitudes . . ."<sup>21</sup> and stir public interest, leading to public acceptance of the amendment presented to them for ratification in 1962.<sup>22</sup>

The 1964 Judicial Article transformed a complex judicial system into a simple and efficient court organization. It created an up-to-date, unified court structure which at the time was praised as the most modern system in the country.<sup>23</sup> Central features included the following: (1) a three-tiered court structure, with a supreme, appellate, and circuit courts that could not be added to or deducted from by the General Assembly;<sup>24</sup> (2) centralized administrative authority in the supreme court;<sup>25</sup> (3) a proscription on mandatory appellate jurisdiction from the appellate court to the supreme court, except where the appellate court filed a certificate of importance or where a constitutional question of first impression arose, and from the circuit courts directly to the supreme court in only three circumstances;<sup>26</sup> (4) appeal as a matter of right to the appellate court in all cases which could not be appealed directly to the supreme court;<sup>27</sup> (5) circuit courts with unlimited original jurisdiction of all justiciable matters, with circuit and associate judges and magistrates, and under the administrative

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21. R. COHN, *supra* note 1, at 11.

22. *Id.*

23. SUPREME COURT ANNUAL REPORT, 1971, *supra* note 13.

24. ILL. CONST. OF 1870 art. VI, § 1 (1962).

25. ILL. CONST. OF 1870 art. VI, § 2 (1962).

26. ILL. CONST. OF 1870 art. VI, § 5 (1962).

27. ILL. CONST. OF 1870 art. VI, § 7 (1962).

direction of a chief judge accountable to the supreme court;<sup>28</sup> (6) the creation of an Illinois Courts Commission with authority to suspend without pay or remove judges from office for cause;<sup>29</sup> and (7) provisions making each judge a state officer with a salary paid by the state<sup>30</sup> and requiring that all judges be licensed attorneys at law.<sup>31</sup>

A criticism of the 1964 Judicial Article amendment was that it perpetuated the adversary elective process for the selection of supreme, appellate and circuit judges. As in 1957, when proponents had been forced to yield on their merit plan for judicial selection, a new compromise had to be struck in 1961 to get the proposition out of the General Assembly and to the voters. The bar reluctantly agreed to accept continued judicial election; and, in return, the political parties agreed to accept an appointment system for associate circuit judges and the third aspect of the merit selection structure—incumbent judges would be required to seek retention in nonadversarial elections and obtain a fifty percent or more “yes” vote on the retention question to remain in office.<sup>32</sup>

Attempts in 1965 and 1967 by the organized bar to secure approval of its merit plan of selection by the General Assembly also proved fruitless. The 1965 proposal was introduced with the sponsorship of a dozen or so legislators as House Bill 1302. It was referred to committee where it ended up being tabled a couple of months later. The 1967 measure received the consideration of the House Committee on Judiciary, but it was soundly defeated when put to a vote in Committee.<sup>33</sup>

## II. THE FIGHT GOES ON

### A. THE 1970 CONSTITUTION

When the Sixth Illinois Constitutional Convention got underway in December of 1969, protagonists on both sides of the judicial selection issue were prepared for a fight. In fact, individuals running as convention delegates, particularly in Cook County, had been interrogated about their views on the selection of judges by the various issue oriented organizations before organizational support was given.

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28. ILL. CONST. OF 1870 art. VI, § 8-9 (1962).

29. ILL. CONST. OF 1870 art. VI, § 18 (1962).

30. ILL. CONST. OF 1870 art. VI, § 17 (1962).

31. ILL. CONST. OF 1870 art. VI, § 15 (1962).

32. R. COHN, *supra* note 1, at 20.

33. *Id.* at 21-22.



Cook County Democratic regulars had backed those who indicated clear support for the existing adversary elective method.<sup>34</sup> Meanwhile, a joint committee of the Illinois State and Chicago Bar Associations, created in reaction to press and public criticism of the judiciary resulting from a couple of instances of judicial impropriety, ended up submitting recommendations for revision of the judicial article to the constitutional convention soon after the convention got under way. Included was a proposal for adoption of the merit plan of selecting judges.<sup>35</sup>

The question first formally came before the convention in January, 1970, when Supreme Court Justice Walter Schafer addressed the eleven member Judiciary Committee, advocating that appellate and supreme court judges be appointed.<sup>36</sup> It continued to be a focal point of the testimony which was presented by bar association representatives, individual lawyers, representatives of numerous associations and organizations, deans of six law schools in Illinois, judges and clerks of the supreme, appellate and circuit courts, then Lieutenant Governor Paul Simon, members of House committees, officers of the American Judicature Society, and others until early into April of that year.<sup>37</sup>

The Judiciary Committee, charged with the responsibility of making recommendations to the convention on the judicial article, appeared on its face to favor the election of judges position. It was comprised of four Cook County organizational Democrats; three downstate Republicans, two of whom appeared to favor election over appointment; one Chicago Republican who campaigned, while running for a delegate slot, in support of the elective method; two independent Democrats; and one Republican downstater, appointed as Chairman, who indicated support for the merit plan.<sup>38</sup> It, therefore, came as a surprise when the Committee, by a vote of 6 to 5, put forth a proposal that supreme and appellate court judges be appointed, circuit court judges be elected, and the question of whether to appoint circuit judges be submitted separately to the voters in referendum balloting on the draft constitution.<sup>39</sup>

On the first reading before the convention, the Judiciary Committee's majority proposal was vigorously attacked. It was subjected to several attempts to weaken or displace it by way of amendment,

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34. *Id.* at 26.

35. *Id.* at 29-30.

36. Kenney, *supra* note 8, at 37.

37. R. COHN, *supra* note 1, at 65-67. *See also* Kenney, *supra* note 8, at 37.

38. R. COHN, *supra* note 1, at 34-35.

39. *Id.* at 71.

but when the debate was all over, the Committee proposal survived by a vote of 62 to 33.<sup>40</sup>

By the time of the second reading, judicial article loyalties had shifted. Minor changes were made in other provisions of the judicial article, and then the selection issue came to the fore. A series of amendments were introduced that called 1) for the election method to be substituted in the proposed constitution for the merit method at all levels, and 2) for appointment at all levels to be submitted as a separate item. They were debated and approved 58-49.

Chicago regular and downstate Democrats and the more conservative Republicans made up the winning side. It was clearly a triumph for the status quo. Fourteen downstate Republicans came over to favor election status quo. Fourteen downstate Republicans came over to favor election of judges on this vote, from the opposite [sic] position on first reading. . . .<sup>41</sup>

Although the merit plan ended up in the less favored position under this arrangement, its proponents temporarily accepted defeat. The final second reading vote on the Judicial Article, with the election of judges included in the draft and appointment a separate item, was 103 to 3.<sup>42</sup>

Third reading began on August 27, 1970. Convention rules required a suspension of the rules by a simple majority of 59 votes in order for changes to be introduced. Delegates spent two days jockeying for favorable treatment of the alternatives of single-member and cumulative voting in the legislative article. A trade involving cumulative voting, banking, and judicial selection questions was being hammered out. Finally on the third day, a motion was made to suspend the rules so that both the cumulative voting versus single member districts issue and the judicial election versus judicial appointment issue could be separately submitted to the voters. In each case, if the proposition received a majority of the vote in the referendum, it would become a part of the constitution. A long, tedious debate followed. The motion ultimately prevailed in a roll call vote of 70 to 39.<sup>43</sup> The following day (August 30), the judicial article, as amended,

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40. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1970, RECORD OF PROCEEDINGS [hereinafter RECORD OF PROCEEDINGS] Vol. I; Kenney, *supra* note 8, at 39-42; R. COHN, *supra* note 1, at 93-101.

41. Kenney, *supra* note 8, at 42.

42. *Id.*

43. *Id.* at 47-50.



was approved by convention delegates.<sup>44</sup> The fight over Proposition 2-A, the adversary elective process, and Proposition 2-B, the merit appointment process, moved to the public arena.

A bitter campaign followed. Mayor Richard J. Daley and the Cook County Democratic organization vigorously supported 2-A. Wayne Whalen, an independent Democrat from the 35th Senatorial District who had served on the convention Judiciary Committee, undertook leadership of the 2-B effort. With limited personnel, time, funds and space, he was able to wage a remarkable campaign in Cook County. In the downstate counties there was only a semblance of an organized effort. On the 2-B side, the Committee for Merit Selection and the Republican Party in Cook County and the League of Women Voters statewide played a key role. Also impressive was the almost unanimous editorial support by the statewide press for the merit plan.<sup>45</sup>

When it was all over, 2-A won by a statewide vote of 1,013,559 to 867,230. The merit plan failed by a margin of less than 150,000 votes. As it broke down, however, Cook County, five collar counties—DeKalb, DuPage, Kane, Lake and McHenry—and the downstate county of McLean had supported judicial appointment. Downstate Illinois carried the judicial elective process.<sup>46</sup>

Proposition 2-A did make one significant change in the election process. The 1964 Judicial Article called for the nomination of all judges by “party convention or primary.”<sup>47</sup> The legislature, by statute, had provided for nomination by the party convention method only.<sup>48</sup> But, “[c]onvention nominations too frequently degenerated into political travesties in which convention delegates, handpicked by political leaders and bound by party discipline, simply rubberstamped their leader’s choice for judge.”<sup>49</sup> With the adoption of the 1970 Constitution, the party primary replaced the party convention as the principal vehicle through which judges are nominated for the general election. It was left to the General Assembly to determine whether the primaries and elections would be partisan or non-partisan. The

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44. RECORD OF PROCEEDINGS, *supra* note 40, Vol. I at 6 & 7.

45. R. COHN, *supra* note 1, at 141 and Kenney, *supra* note 8, at 54-55.

46. Watson, *Analysis of the Vote at the Election for the 1970 Illinois Constitution*, ILLINOIS GOVERNMENT 2-3 (Feb., 1971).

47. ILL. CONST. of 1870 art. VI, § 10 (1964).

48. ILL. REV. STAT. ch. 46, para. 9-1 to 9-6 (1971).

49. Cohn, *The Illinois Judicial Department—Changes Effected by Constitution of 1970*, 1971 U. ILL. L. F. 355, 394 (1971).

Constitution also opened up one other means for candidate names to appear on the general election ballot—by petition.<sup>50</sup>

The associate judges continued to be appointed by the circuit judges. The supreme court retained authority to set up the process for associate judge selection. Rather than serving at the pleasure of the circuit judges, associate judges were given four year terms. Magistrate positions were abolished.<sup>51</sup>

With regard to supreme, appellate and circuit court judges, the 1970 Constitution continued the nonadversary, non-partisan retention elections of incumbent judges. An amendment increased from fifty to sixty percent the required affirmative vote of electors that an incumbent judge must obtain to remain in office.<sup>52</sup>

In theory, the 1970 judicial selection changes were designed to weaken the role of political party leaders in the selection process. In practice, they were less effective than their supporters envisioned.

#### B. SUBSEQUENT LEGISLATIVE PROPOSALS

Proponents of merit selection wasted no time after the referendum election and the adoption of the 1970 Constitution in bringing the issue before the General Assembly. Two different avenues were pursued. Because incorporating Proposition 2-A into the Constitution left the method of filling vacancies to the discretion of the legislature (or the supreme court in the absence of legislation on the question), judicial vacancy merit selection plans were introduced in the 77th General Assembly and in each session of the General Assembly since then, except the 78th and 85th.<sup>53</sup> Merit selection proposals were also

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50. ILL. CONST. art. VI, § 12(a). Section 12(a) reads as follows: Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. A person eligible for the office of Judge may cause his name to appear on the ballot as a candidate for Judge at the primary and at the general or judicial elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions.

51. ILL. CONST. art. VI, § 8.

52. ILL. CONST. art. VI, § 12(d). The change came about because of concern among many lawyers that the 50% requirement made it impossible to remove an incompetent judge. Cohn, *supra* note 49, at 401.

53. See, e.g., H.B.2901, 77th Ill. Gen. Assembly, 2nd Reg. Sess. (1972); H.B.3279, 79th Ill. Gen. Assembly, 2nd Reg. Sess. (1976); H.B.1780, 8th Ill. Gen. Assembly, 1st Reg. Sess. (1977); H.B.2630, 81st Ill. Gen. Assembly, 1st Reg. Sess. (1979); H.B.1442, 82nd Ill. Gen. Assembly, 1st Reg. Sess. (1981); S.B.1810, 83rd Ill. Gen. Assembly, 2nd Reg. Sess. (1984); H.B.1770, 84th Ill. Gen. Assembly, 1st Reg. Sess. (1985).



introduced that would have led to a constitutional amendment of the judicial article and a referendum by the general public.<sup>54</sup> Other legislators pushed a third avenue of reform which involved changing the election method from a partisan to a non-partisan one.<sup>55</sup>

A large number of vacancies occur in the courts each year due to the death, retirement, appointment or election of judges to higher courts, or judges' desires simply to leave the bench for one reason or another. The positions then need to be filled until a replacement can be selected at the next election. Proponents of merit selection would prefer to have these vacancies filled through a merit selection process rather than by the supreme court. The judicial vacancy selection plans that they have introduced have taken a variety of forms. An early one that carried the entire Republican sponsorship of the House would have created nomination commissions made up of legislators in their respective circuits and districts. When there was a vacancy at the supreme, appellate or circuit court level, the appropriate nomination commission would have selected a panel of candidates from which the governor would have made final appointments.<sup>56</sup> A second model called for the supreme court to fill supreme, appellate and circuit court vacancies from a list of individuals nominated by a lawyer and nonlawyer nominating commission. The lawyer members were to have been elected by bar association members from their respective court districts and circuits. Nonlawyer members would have been appointed by the governor.<sup>57</sup> Another variation called for the governor to make judicial appointments from a list of candidates submitted by nominating commissions of lawyers and nonlawyers appointed by the governor in the various court districts and circuits.<sup>58</sup>

Resolutions to amend the judicial article of the constitution have been even more varied than the vacancy merit selection proposals. Six different versions have often been pending at any one time. In the first session of the 85th General Assembly, for example, Represena-

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54. *See, e.g.*, S.J. Res. 37, 80th Ill. Gen. Assembly, 1st Reg. Sess. (1977); H.J. Res. 35, 80th Ill. Gen. Assembly, 1st Reg. Sess. (1977); H.J. Res. 20, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987); S.J. Res. 7, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987).

55. *See, e.g.*, H.B.3761, 77th Ill. Gen. Assembly, 1st Reg. Sess. (1971) and H.B.2267, 80th Ill. Gen. Assembly, 1st Reg. Sess. (1977).

56. H.B.4349, 77th Ill. Gen. Assembly, 2nd Reg. Sess. (1972).

57. *See, e.g.*, H.B.3279, 79th Ill. Gen. Assembly, 2nd Reg. Sess. (1976); H.B.2630, 81st Ill. Gen. Assembly, 1st Reg. Sess. (1979); H.B.3269, 83rd Ill. Gen. Assembly, 2nd Reg. Sess. (1984).

58. *See, e.g.*, H.B.1267, 81st Ill. Gen. Assembly, 1st Reg. Sess. (1979); H.B.1442, 82nd Ill. Gen. Assembly, 1st Reg. Sess. (1981).

tives Dunn, Netsch, Kelly, Ronan, Farley and Cullerton introduced merit plans. (The plans have been identified in reference to their lead sponsor.)<sup>59</sup> A seventh proposal developed as the product of the Task Force on Judicial Merit Selection, which was created by the governor last year, will be introduced when the General Assembly reconvenes for the second session.<sup>60</sup>

The Task Force, Dunn and Netsch proposals call for the governor to appoint Illinois' judges.<sup>61</sup> Under the Kelly and Cullerton plans the supreme court would be the appointing authority.<sup>62</sup> Ronan would have the governor make the appointments of circuit judges with the consent of the Senate.<sup>63</sup> Farley would have the Director of the Administrative Office of the Illinois Courts randomly select appellate and circuit judges from lists of nominees supplied by a nominating commission, with the names selected needing approval by the supreme court justices from the appropriate judicial districts.<sup>64</sup>

The Task Force, Dunn and Kelly plans would pertain to all judges throughout the state.<sup>65</sup> The Cullerton bill calls only for the appointment of appellate and circuit judges, with supreme court judges continuing to be elected.<sup>66</sup> Netsch, Ronan and Farley provide for local options. Netsch would require appointment of supreme and appellate judges, but appointment of circuit and associate judges only

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59. H.J. Res. 20, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1989); H.J. Res. 3, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987); S.J. Res. 4, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987); H.J. Res. 5, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987); H.J. Res. 16, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987); H.J. Res. 18, 85th Ill. Gen. Assembly, 1st Reg. Sess. (1987).

60. *See supra* note 6. Both Richard L. Theis, President of the Illinois Bar Association, and the Chicago Tribune in a recent editorial, have endorsed adoption of the federal court model for Illinois. Under such a system, the governor would appoint the judges at all levels subject to confirmation by the legislature (probably the Senate). Judges would have life-time tenure. Thus far, this model has not made its way into the General Assembly. *Bar President: Appoint Illinois Judges for Life*, Chicago Tribune, Nov. 23, 1986, § 1, at 5, col. 1.

61. Task Force on Judicial Merit Selection, Proposed Constitutional Amendment of article VI, § 12.1(a) (Adopted Dec. 3, 1987); H.J. Res. 20, *supra* note 59, at § 11.1(a); S.J. Res. 7, *supra* note 59, at § 12.1(b).

62. S.J. Res. 14, *supra* note 59, at § 8 & 12; H.J. Res. 18, *supra* note 59, at § 12(a).

63. H.J. Res. 5, *supra* note 59, at § 12.1(b).

64. H.J. Res. 16, *supra* note 59, at § 12.1.

65. Task Force on Judicial Merit Selection, Proposed Constitutional Amendment of article VI, § 12.1(a) (Adopted Dec. 3, 1987); H.J. Res. 20, *supra* note 59, at § 11.1(a); S.J. Res. 14, *supra* note 59, at § 8 & 12.

66. H.J. Res. 18, *supra* note 59, at §§ 12(a), (d).



in circuits that choose to adopt the appointment method by referendum of the voters.<sup>67</sup> Farley specifies that all appellate, circuit and associate judges within a judicial district that adopts the plan by district-wide referendum of the voters would be appointed. Supreme court judges would continue to be elected.<sup>68</sup> Both Netsch and Farley allow for terminating the appointment of lower court judges after eight years via referendum.<sup>69</sup> Ronan sets up a complicated system whereby all circuit judges would be appointed unless a local option referendum indicated that voters do not support the plan. After five years, the General Assembly would be empowered to review the appointment method and abolish it as to the circuits or extend it to appellate judges. After five more years, the General Assembly could, by legislation, provide for the appointment of supreme court judges as well.<sup>70</sup>

Each plan, except the Kelly plan, calls for the appointing authority to make the appointment from a list submitted by a nominating group. The Task Force, Dunn, Netsch, Ronan and Farley proposals would have the judges selected from a list of three nominees generated by applicable circuit or district nominating commissions.<sup>71</sup> Cullerton's nominee list would be developed entirely by judges. Appellate nominees would be recommended by the appellate judges of the district where the vacancy occurs. Circuit judge nominees would be submitted to the supreme court by a nominating committee consisting of the Chief Judge and at least two, but no more than ten, circuit judges.<sup>72</sup> Under Kelly's plan, no formal mechanism for generating nominees to the supreme court for the appellate or circuit court positions is specified. The plan does call for the supreme court to consider recommendations from Illinois bar associations and other appropriate organizations.<sup>73</sup>

Of the plans that include judicial nominating commissions, the make-up of the commissions vary somewhat. Dunn and Netsch provide for 11 member commissions—six laypersons and five lawyers.

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67. S.J. Res. 7, *supra* note 59, at § 12.2.

68. H.J. Res. 16, *supra* note 59, at § 12.

69. S.J. Res. 7, *supra* note 50, at § 12.2(b); H.J. Res. 16, *supra* note 59, at § 12.2(b).

70. S.J. Res 5, *supra* note 59, at §§ 12.2 & 12.6.

71. Task Force On Judicial Merit Selection, Proposed Constitutional Amendment to article VI, §§ 12.1(c)-(e) (Adopted Dec. 3, 1987); H.J. Res. 20, *supra* note 59, at §§ 11.1(a), 11.2; S.J. Res. 7, *supra* note 59, at § 12.3; H.J. Res. 5, *supra* note 60, at § 12.3; H.J. Res. 16, *supra* note 59, at § 12.3.

72. H.J. Res. 18, *supra* note 59, at § 12(d).

73. S.J. Res. 14, *supra* note 59, at §§ 8, 12.

Three laypersons would be named by the Attorney General and three by the next highest ranking elected constitutional officer of the State (Secretary of State, Comptroller, Treasurer, President of the Senate, Speaker of the House, Minority Leader of the Senate, or the Minority Leader of the House) who is of a different political party from that of the Attorney General. The lawyer members would be elected without party designation by other lawyers who have principal offices in the district or circuit.<sup>74</sup> Ronan calls for six laypersons, five lawyers, and a non-voting circuit judge from the applicable circuit to constitute the nominating commissions. Lay members would be appointed by the Speaker of the House, the President of the Senate, the Minority Leader of the Senate, and the two highest constitutional officers of the two political parties (except the Governor and Lt. Governor). Lawyer members would be elected without party labels by lawyers who have a principal office in the circuit.<sup>75</sup> Farley's nominating commissions would also be made-up of 11 members—six laypersons and five lawyers. The lawyers would be elected with party designation, alternating between the parties, by lawyers whose principal office is in the district or circuit. Two of the laypersons would be appointed by the governor, each from a different political party; and one each would be appointed by the four legislative leaders.<sup>76</sup> Under the Task Force plan, the composition of the commissions would be different in Cook Country than for the rest of the State. In districts and circuits with more than three million people, commissions would have 15 members: eight non-lawyers (at least two appointed at large and two appointed from subdistricts) and seven lawyers (two appointed at-large and one from a subdistrict). Less populated districts and circuits would have 11 member commissions. Half of the non-lawyers would be appointed by the Attorney General; the other half by the highest elected state official who is not of the same political party as the Attorney General. The lawyer members would be selected as provided for by supreme court rule.<sup>77</sup>

Under the Task Force and Dunn plans, the office of associate judge would be abolished while all present associate judges would become circuit judges.<sup>78</sup> Netsch and Farley would retain the office of

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74. H.J. Res. 20, *supra* note 59, at §§ 11.2 (b), (c), (d); S.J. Res. 7, *supra* note 59, at §§ 12.3 (b), (c), (d).

75. H.J. Res. 5, *supra* note 59, at §§ 12.3 (b), (c), (d).

76. H.J. Res. 16, *supra* note 59, at §§ 12.3(b), (c), (d).

77. Task Force on Judicial Merit Selection, Proposed Constitutional Amendment to article VI, § 12.2 (Adopted Dec. 3, 1987).

78. *Id.* at § 12.2(g); H.J. Res. 20, *supra* note 59, at § 11.1(g).



associate judge, but would have them be selected under the merit system in those locales exercising their merit selection local option.<sup>79</sup>

Under the Task Force, Dunn and Ronan models, the initial term of office of all judges would be six years with subsequent terms of ten years.<sup>80</sup> Under the Cullerton plan, judges would continue to stand for retention election at the expiration of each term, as provided in the 1970 Constitution.<sup>81</sup> Kelly would have reappointments determined by the supreme court.<sup>82</sup> The Task Force, Dunn, Netsch, Ronan and Farley proposals would create review commissions to evaluate incumbent judges seeking retention. Under each model, judges recommended by the commissions for retention would be retained without more. Judges rejected by the commissions would stand for retention at the next general election.<sup>83</sup>

As noted previously, the 1970 Constitution left it to the legislature to decide whether judicial races would be partisan or non-partisan. The General Assembly chose the partisan route. Bills for partisan primaries and elections, with the opportunity for nomination by petition, were passed by the 77th Illinois General Assembly in November, 1971. They were vetoed by the governor on the ground that partisan primaries and elections would perpetuate the undesirable political controls seen in past judicial races. However, the vetoes were overridden on January 13, 1972, and partisan politics has, as the governor predicted, played a significant role in the election of judges.<sup>84</sup> Over the years, legislators have introduced proposals to change the election method from a partisan to a non-partisan system. Under one bill, all candidates for judge would run against each other in a non-partisan primary; no party identification would appear on the ballot. The candidates receiving the two highest numbers of votes would run in the general election, again without a party label.<sup>85</sup>

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79. S.J. Res. 7, *supra* note 59, at § 12.2; H.J. Res. 16, *supra* note 59, at § 12.1(a).

80. Task Force On Judicial Merit Selection, Proposed Constitutional Amendment to article VI, § 10 (Adopted Dec. 3, 1987); H.J. Res. 20, *supra* note 59, at § 10; H.J. Res. 5, *supra* note 59, at § 10.

81. H.J. Res. 18, *supra* note 59, at § 12(e).

82. S.J. Res. 14, *supra* note 59, at § 12(c).

83. Task Force on Judicial Merit Selection, Proposed Constitutional Amendment to article VI, § 12.4 (Adopted Dec. 3, 1987); H.J. Res. 20, *supra* note 59, at § 12.1; S.J. Res. 7, *supra* note 59, at § 12.5; H.J. Res. 5, *supra* note 59, at § 12.5; H.J. Res. 16, *supra* note 59, at § 12.5.

84. Cohn, *supra* note 49, at 396 n.162. *See also infra* text accompanying notes 120-123.

85. H.B. 2267, *supra* note 55.

The non-partisan election method has its critics too. They contend that political parties would still be involved in judicial selection. In spite of the apparently non-partisan process, their involvement would merely shift behind the scenes. Further, they argue, "party labels, for better or worse, are one of the few indicators the public may have of the judicial philosophy of a candidate."<sup>86</sup> Recent studies have verified that:

[w]here partisan labels are not available, voters must rely upon other kinds of short-cut guides to voting, such as incumbency, name familiarity, or ethnic-religious affiliation of the candidate. And where none of these other nonparty cues are meaningful to the individual voter, votes may be cast on the basis of sex, nickname, or ballot position of the respective candidates, truly arbitrary decision-making tools.<sup>87</sup>

Thus far, all avenues of judicial selection reform have failed. The General Assembly has steadfastly refused to set up a merit system for filling vacancies or to put a constitutional amendment on merit selection up for a popular referendum. Nor has the non-partisan election reform been able to muster General Assembly approval. The partisan versus non-partisan issue, however, is no longer central. All indications are that proponents will not stop until the partisan judicial election system gives way to some compromise merit selection method, via either General Assembly/voter referendum approval or constitutional convention/voter referendum approval.

#### IV. IS CHANGE WORTH THE EFFORT?

In the early days of our country's history and up until the mid-1800's, all of the states chose judges, either via appointment by the legislature, or appointment by the governor with the consent of the legislature or a special council. The executive appointment method is still used in the federal judiciary and in a small number of states. Legislative appointment of judges still occurs in three states. The appointment method is most often accompanied by life-time tenure for the judges. This method is based upon the belief that judges should decide disputes in a reasoned, disinterested fashion according to law. Judges are seen as objective interpreters of the law who derive their legitimacy from objectivity and professionalism. The appoint-

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86. Kopecky, *Should Judges Be Elected or Appointed?*, 3 ILL. ISSUES 14, 17 (Dec., 1977).

87. P. DUBOIS, *FROM BALLOT TO BENCH* 245 (1980).



ment procedures used are said to maximize the two goals of competence and independence.<sup>88</sup>

The appointment method is no longer used by most states, because it gradually came to be viewed as an elitist political spoils system where elected public officials rewarded their loyal party workers. Simultaneous to its demise, the concept of popular election began to emerge during the Jacksonian era (1820s—1850s) as a part of the larger push to make government more democratic. As political parties grew in strength, judicial elections became partisan. Candidates for judgeships were nominated by party conventions and they campaigned along with candidates for other offices.<sup>89</sup> Today, proponents of popular elections primarily value a judiciary that is responsive to the wishes of those it serves. They believe judges should be accountable to the people for the policy choices they make, recognizing that the states' highest courts often make law in addition to interpreting it. The electorate is seen as competent to evaluate the qualifications of judicial office-seekers. Party labels are said to provide the voters with guidance on the policy orientations of the candidates.<sup>90</sup> Illinois is among 14 states that employ partisan election as the primary method of selecting major court judges.<sup>91</sup>

Merit systems for judicial selection, on the other hand, are viewed as a means of balancing accountability with judicial competence and independence. Public accountability is said to be preserved 1) by having nominating commissions composed of professionals and citizens who are carefully selected for their role of evaluating candidate credentials, and 2) by requiring that judges submit to a retention election on a periodic basis. Arguably, because judicial candidates do not have to seek political support from a party, they are not obligated to bargain away their independence.

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88. Wasmann, Lovrich, & Sheldon, *Perceptions of State and Local Courts: A Comparison Across Selection Systems*, 11 JUST. SYS. J. 168, 170 (1986). See also M. COMISKY & P. PATTERSON, *THE JUDICIARY: SELECTION, COMPENSATION, ETHICS AND DISCIPLINE* 5-6 (1987); P. DUBOIS, *supra* note 87, at 3.

89. P. DUBOIS, *supra* note 87, at 3.

90. Wasmann, Lovrich, & Sheldon, *supra* note 88, at 171.

91. M. COMISKY & P. PATTERSON, *supra* note 88, at 7-8. Fourteen other states utilize non-partisan election for all or some of their major courts. *Id.* at 9. Non-partisan elections were adopted by the turn of the twentieth century because of rising dissatisfaction with partisan elections. P. DUBOIS, *supra* note 87, at 4. Judicial appointment of judges is rare in this country. It is used most frequently as a method of selecting members of the minor judiciary and associate, special and substitute judges. Illinois and Louisiana are the only states in which vacancies are filled in the major courts by the state's highest court. M. COMISKY & P. PATTERSON, *supra* note 88, at 6-7.

Merit selection is the newest of the various selection reforms. It was developed and promoted in the early 1900s by various segments of the legal profession unhappy with both partisan and non-partisan elections. The American Bar Association first endorsed a merit selection plan in 1937.<sup>92</sup> At the present time, twenty-four states are subject to constitutional or statutory merit plans in the selection of all or some of their appellate and major trial court judges. Eleven other states have adopted voluntary commission models.<sup>93</sup>

It is generally agreed that in selecting judges to the various courts, mechanisms should be used that attract qualified applicants. Selection should be based on criteria such as legal ability, experience, impartiality, fairness, temperament and industriousness. Judicial decision-making should be shielded from considerations of political partisanship and political ideology to the greatest extent possible. Once selected, judges should not be terminated for reasons that are not related to their qualifications and job performance. It is against these assumptions that the current election method used in Illinois and the proposed merit method will be analyzed. Attention will be focused on the extent to which the values of quality, accountability, and independence are or could be given effect.

#### A. QUALITY

Critics of judicial election often assert that electoral politics prevent many qualified candidates from seeking judicial posts in the first place.

Successful lawyers are said to be reluctant to set aside their lucrative law practices to pursue election to the judiciary. Clients and cases must be set aside temporarily while the attorney conducts a campaign with no assurances that his or her practice will be intact if the bid is unsuccessful. . . . Qualified attorneys are also said not to seek elective judicial office because they are unwilling to engage in the electioneering and campaigning required for a successful bid for office. . . . Additionally, lawyers are reluctant to participate in a selection process which, in their view, more frequently rewards individuals skilled in politics than it does those who possess superior professional qualifications.<sup>94</sup>

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92. P. DUBOIS, *supra* note 87, at 4.

93. M. COMISKY & P. PATTERSON, *supra* note 88, at 10-11.

94. P. DUBOIS, *supra* note 87, at 6.



Further, critics argue that the election method allows unqualified individuals to be selected. As the argument goes, candidates are selected by voters who generally lack knowledge of the candidate's qualifications and/or who are relatively indifferent to the outcome of judicial elections. Voters are tied more to party identity than candidate credentials. Voters are said not to be competent to evaluate candidates' qualifications, and therefore professionals need to be more directly involved. The large number of judicial candidates on the ballot in some areas is said to confuse the public, making it difficult for them to choose the most qualified from among the group. Finally, critics of elections point to the fact that party nominees are generally selected by political leaders who care more about political expediency than the comparative merit of the particular candidates.<sup>95</sup>

Is there truth to these claims? At present, there is no conclusive evidence concerning the extent to which the elective method of judicial selection serves as a deterrent to qualified individuals seeking judge-ships.<sup>96</sup> There are anecdotal accounts of lawyers who decided not to seek judicial posts because of the rigors of campaigning and the uncertainty of the outcome. Any practicing lawyer knows of the impossibility of putting cases and clients on hold during a campaign. Cases have to be shifted to other associates or firms and, once shifted, clients may or may not return. Also, what about the lawyer's lost income during the campaign period? Candidates for other offices are often able to draw a salary while they campaign.

On the other hand, one cannot ignore the realities of partisan judicial election in Illinois. For years candidates have been slated by party chieftains. They often run unopposed in the primary, and then, because of their party label, run without real opposition in the general election.<sup>97</sup> This process carries with it very little uncertainty for candidates with appropriate party endorsements.

With regard to the question of whether or not the partisan elective process puts unqualified candidates on the bench, there is some available information. It has been shown that some unskilled judges are currently on the bench in Illinois. For example, a nine-member Special Commission on the Administration of Justice, set up following the Greylord scandal in Cook County, concluded that there is a pool

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95. *Id.* at 7; M. COMISKY & P. PATTERSON, *supra* note 88, at 8; A 'Compromise' on Merit Selection, Chicago Tribune, Feb. 25, 1987, § 1, at 14, col. 1.

96. P. DUBOIS, *supra* note 87, at 12.

97. Wheeler, *What's All This Fuss About Merit Selection?*, 13 ILL. ISSUES 4 (Mar., 1987); *Let's Select Judges on Their Merit, Not Their Politics*, Chicago Tribune, Jan. 21, 1987, § 1, at 17, col. 2. See also *infra* text accompanying notes 120-23.

of judges in the Cook County Criminal Court who are unqualified to perform their functions. The Commission found that the random assignment of cases, devised to prevent judge-shopping, was being circumvented. Only a select group of more skilled judges were being assigned the more complex or controversial cases.<sup>98</sup> Further, any lawyer, litigant, or court watcher who regularly observes the courts can also attest to the incompetence of some judges.

It is also clear that bar association evaluations of judges or prospective judges do not work well on a consistent basis, since incompetent or unethical judges end up receiving positive endorsements. Illustrative is the case of Judge Joseph McDermott, a judge convicted of accepting bribes in Cook County Traffic Court. Prior to his conviction, he ran for retention in the November, 1986 election as a choice of the Democratic regulars. He was elected. However, the bar associations failed to pick up on the fact that Greylord charges had been lodged against him. In fact, the Chicago Bar Association rated him "qualified for retention," while the Chicago Council of Lawyers said that he was "unqualified" because he lacked experience (not because of concerns about integrity). In spite of the unqualified rating, the Council determined that he was a "well-regarded practitioner."<sup>99</sup>

Typically, bar groups delve into all aspects of a candidate, including their legal abilities, legal knowledge, temperament and integrity.<sup>100</sup> Volunteer attorneys reach their conclusions after reviewing candidate questionnaires and reports prepared by investigative teams. Interviews are held with each applicant. Bar association members are

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98. *Verdict on Judge: Unskilled*, Chicago Tribune, Feb. 12, 1987, § 2, at 2, col. 3.

The Greylord investigation has been viewed as one of the most comprehensive, intricate and difficult undercover projects ever undertaken by a law enforcement agency. Under the supervision of U.S. Attorney Dan Webb, the FBI engaged in a variety of tactics to undercover corruption in the circuit court of Cook County. Electronic eavesdropping was conducted in judges' chambers, court cases were contrived with FBI agents passing as corrupt lawyers, drunken drivers and defendants giving false statements under oath. The investigation yielded indictments of judges, lawyers, police officers, deputies and court clerks. As a result of Greylord, thus far, eight judges have been convicted of wrongdoing and one associate judge has been acquitted. See *Questions on Greylord Still Remain*, Chicago Tribune, May 3, 1987, § 2, at 1, col. 5.

99. *Lawyers Admit Lapse on Rating: McDermott Bribe Charge Ignored*, Chicago Tribune, Nov. 21, 1986, § 2, at 1, col. 5.

100. *New Judge's Bribery Accusations Escaped Voters*, Chicago Tribune, Nov. 16, 1986, § 3, at 1, col. 2.



often surveyed as to the capabilities of the candidates. Some bar groups rate the candidates and give reasons for their findings. Others simply make public their ratings.<sup>101</sup> In the McDermott case, evaluators failed to ask McDermott the right questions and overlooked information that had been supplied to them by the U.S. Attorney.

Even when all goes as planned, there are inherent flaws in the system. Bar association surveys of members are far from reliable. All lawyer members in a district or circuit are generally polled. There is nothing to prevent lawyers who are unfamiliar with a candidate's performance from completing the survey and returning it anyway, or to prevent candidates from soliciting the cooperation of lawyer-friends and associates in filling them out.<sup>102</sup>

Additionally, the ratings of bar associations are often ignored by voters. An example can be found in the Cook County Democratic primary race in the Spring, 1986. Three judicial candidates, who were endorsed by Mayor Harold Washington, won despite being rated unqualified by the Chicago Bar Association.<sup>103</sup> This is not too surprising, however, when one considers the fact that the various bar groups cannot even agree on which judges are qualified and which are not. In the November, 1986 general election, the Chicago Council of Lawyers evaluated eight of 38 judges seeking retention as unqualified. The Chicago Bar Association found 24 of the retention judges highly qualified, including three judges that the Council rated as unqualified.<sup>104</sup>

Whether or not more incompetent judges ascend to the bench because of the elective method than would be found under a merit

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101. *Two Groups of Lawyers Lash Out at Retention of Five Circuit Judges*, Chicago Tribune, June 25, 1987, § 2, at 2, col. 2; *Eight Judges Don't Rate With Bar Group*, Chicago Tribune, Oct. 8, 1986, § 2, at 1, col. 5.

102. This kind of survey is often used by circuit judges in seeking input on applicants for associate judgeships. The surveys are often no more than popularity contests. Until recently, the ratings in the Seventh Circuit were released to the press in spite of the unwarranted damage to the professional reputations of the applicants that this might have caused. The public was not made aware of the unreliability of the research methods employed, only of the results. *Seventh Circuit Moving Toward Filling Vacancies for Judges*, STATE J. REG., Jan. 22, 1988, at 10.

103. *Politicians Not Exactly Friends of the Court as Judges Fight for Retention*, Chicago Tribune, Sept. 14, 1986, § 5, at 4, col. 1. See also Lermack, *Illinois Judges: Too Much Retention and Too Little Selection*, 5 ILL. ISSUES, 8-11 (June, 1979). Of 16 downstate judges opposed by the Illinois Bar Association in 1978, 14 were retained. Of 33 judges rated as unqualified by the Bar Association between 1970 and 1978, 31 were elected. *Id.*

104. *Eight Judges Don't Rate With Bar Group*, *supra* note 101. See, also, *Lawyers Group Disputes Ratings*, 9 NAT'L L.J., Oct. 20, 1986, at 9, col. 1.

method, however, is difficult to assess. One technique used by researchers to answer this question has been to conduct surveys. Watson and Downing, for instance, surveyed Missouri lawyers regarding the performance of current circuit and appellate judges. They found that judges selected under the merit plan were rated as more competent than judges who originally came to the bench under the election system used in Missouri prior to 1940.<sup>105</sup> On the other hand, the Yankelovich, Skelly and White Polling Organization surveyed and conducted nationwide interviews with members of the general public, community leaders, judges and lawyers to determine how their perceptions of the courts and judges were influenced by the judicial selection method. They found little evidence that the selection method used actually affected perceptions of judicial competence.<sup>106</sup>

Further, the survey approach presents some methodological difficulties. One difficulty is that the evaluation criteria being used by each respondent is never known. A second difficulty is that a rater's disposition toward one method over the other can affect survey reliability. In the Missouri survey, for example, a positive relationship between the respondents' evaluation of judicial performance and their support for a particular selection method was shown, thus coloring the survey results.<sup>107</sup>

Aware of these shortcomings, some scholars have tried looking to more objective measures of judicial quality. They have analyzed the education and experience of judges, under various selection methods, as indicators of judicial capability. They start out presuming that merit plans promote the placement of high quality persons to the bench without particular ties to the local community, and that merit candidates will have more impressive academic credentials. They also presume that under the elective method, judges would have more of a history of experience in elective political positions.

The research has not verified these hypotheses. Herbert Jacob compared elected and merit trial and appellate court judges in twelve states in the early 1960s. In terms of education, he found no particular advantage among merit plan judges over elected judges. Elected judges

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105. R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN* 272-308 (1969). A recent study of Missouri judges showed little change in the qualifications and backgrounds of the sitting judges. The only significant difference was that 1986 judges had more prior judicial experience. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U.L.Q. 935-937 (1986).

106. Wasmann, Lovrich, & Sheldon, *supra* note 88, at 181-183.

107. P. DUBOIS, *supra* note 87, at 15.



were more likely to have held prior political office, but not in areas that would prepare them for judgeships. More locally born judges could be found in partisan election states, but judges in merit states were likely to have attended in-state law schools.<sup>108</sup> Bradley Canon compared judges sitting on state supreme courts for the years 1961 to 1968. His research showed that there were no differences between the election and merit plan methods in terms of the educational levels of the judges or their prior public or judicial experience. Elected judges were slightly more likely than merit judges to have been born in-state and to have received their legal educations in-state.<sup>109</sup>

A new study by Henry Glick and Craig Emmert supports these earlier findings. Glick and Emmert collected data on the characteristics of state supreme court judges who were serving in 1980-1981. They found that 1) the merit selection judges were less likely to have been born in-state or to have attended in-state schools than the elected judges; 2) the merit and elected judges were comparable in terms of their educational backgrounds, although a few more merit judges attended prestigious law schools; 3) merit selection judges were more likely to have prior government experience; and 4) the judges of the two systems were similar in terms of their partisan political careers. Overall, they concluded that differences in localism, education, and previous experience was due more to regional factors than to the selection method used.<sup>110</sup>

By comparing the characteristics of Illinois' seven elected supreme court justices on the bench in 1983 to Glick's supreme court merit selection judges, presumptions concerning local ties and political experience appear more valid. One hundred percent of Illinois' supreme court justices were born in-state and eighty-six percent attended Illinois colleges. Only sixty-six percent of Glick's merit judges were born in-state, and fewer than seventy-one percent attended in-state colleges and law schools. Sixty-five percent of Illinois' justices had prior judicial experience, compared to sixty percent of Glick's merit judges, but fifty-six percent of the Illinois' justices ascended to the

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108. Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104-114 (1964).

109. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 L. & SOC'Y REV. 579-593 (May 1972).

110. Glick & Emmert, *Selection Systems and Judicial Characteristics*, 70 JUDICATURE 229-235 (Dec.-Jan. 1987). Canon had also come to the conclusion that differences in judges' background characteristics were more the product of regional factors than the selection system. Canon, *supra* note 109, at 17.

bench via the political office/prosecutorial route compared to only 23.5% of Glick's merit selection judges.<sup>111</sup>

Overall it must be said, however, that empirical comparisons have been inconclusive. "It is exceedingly difficult if not impossible . . . to verify or refute the assertion that the merit plan improves the quality of the bench."<sup>112</sup> Determining who are "best qualified" as judges is a subjective, uncertain and problematic task.

## B. ACCOUNTABILITY

Defenders of popular election rest their case on the notion that judges, like other policy-makers, must be accountable for their decisions. Elections, it is argued, enable the public to assert control over the policy-making process by giving voters an opportunity to examine judges' values and judicial philosophy and to choose judges based on their liberal or conservative bent. As indirect benefits of the election method, the court is said to be accorded greater legitimacy and the interests of minorities and women are said to be given greater prominence.<sup>113</sup>

Judicial elections, however, do not hold judges accountable in the way that was intended. To exercise judgment, the electorate must be able to identify the kinds of policy decisions a candidate can be expected to make and have a meaningful choice between opposing candidates.<sup>114</sup> Judicial election campaigns in Illinois typically do not involve a discussion of substantive issues of judicial policy by opposing candidates. Nor should they. It is a violation of legal ethics for judicial aspirants to discuss their positions on policy issues which have or are likely to come before them.<sup>115</sup> Although voters should be informed about a candidate's professional credentials, they seldom are. In the more populated districts and circuits, voters choose blindly from a long list of names of individuals they don't know and with

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111. Illinois' calculations are based upon data contained in Daniels, Melton, & Wilkin, *The Illinois Supreme Court: What Role Does It Play?*, 10 ILL. ISSUES 11-18 (April 1984).

112. P. DUBOIS, *supra* note 87, at 17.

113. P. DUBOIS, *supra* note 87, at 29-30; *Merit Selection Discriminates Against Minorities, Women: Pincham*, Chi. Daily L. Bull., Oct. 3, 1986, at 36, col. 1.

114. P. DUBOIS, *supra* note 87, at 32-33.

115. See, e.g., S. Ct. R. 67 B(1)(c), *to be codified as* ILL. REV. STAT., ch. 110A, para. 67 (1987). This judicial canon provides in relevant part that a candidate for judicial office should not "announce his views on disputed legal or political issues . . . . [H]e may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him."



whom they have little chance of becoming familiar. They most often do not even know how to evaluate the candidates aside from looking at candidate names, party labels, or candidate position on the ballot.<sup>116</sup> Evaluation mechanisms used by the various bar associations have not proven to be an effective way of educating the voters.<sup>117</sup>

When the voters' interest does get aroused in a judicial race, it is most likely to be the result of a negative campaign launched by a special interest group or newspaper. Sometimes these campaigns do focus on proper political concerns, such as a judge's liberal or conservative inclinations. Other times, though, campaigns are launched against judges who simply attempt to uphold the law in a controversial case. Illustrative are the races of Charles Iben (10th Circuit, 1978) and Lawrence Passarella (Cook County Circuit, 1986). The *Peoria Journal Star* took on incumbent Iben in a series of four editorials. This in turn stimulated letters to the editor and caught the attention of other media. Iben was accused of a variety of things from holding sloppy informal court sessions to keeping short hours. Although the focus of the media was primarily on questions of performance, the truth of the matter was that the newspaper had opposed him because he had a reputation for being a liberal judge and of setting low bail for criminal defendants. His values were not in line with the relatively conservative newspaper or the area within which he worked. He lost his retention bid after obtaining only 50.8% of the affirmative votes.<sup>118</sup> Similarly, Passarella became the target of intense lobbying by police groups after he acquitted a man accused of beating a Chicago policewoman. Passarella received a fifty-seven percent approval rating from the voters and similarly was not retained.<sup>119</sup>

Judicial election rarely gives Illinois voters a real choice. From 1974 to 1984, seventy-one percent of circuit judgeships from the City

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116. A 'Compromise' on Merit Selection, Chicago Tribune, Feb. 25, 1987, § 1, at 14, col. 1; Women's Bar Group Hears Merit Selection Arguments, *supra* note 7; It's Time for Merit Selection, Chicago Tribune, March 27, 1986, § 1, at 27, col. 1. In the Democratic primary election for Cook County Circuit court vacancies in March of 1986, two fringe candidates of questionable qualifications were chosen over higher rated candidates. Something similar happened in 1984 when five virtually unknown candidates beat out better qualified incumbents. The most plausible explanation offered at the time was that candidates with Irish names defeated candidates with non-Irish names. *Id.*

117. See *supra* text accompanying notes 99-104.

118. Lermack, *supra* note 103, at 10; ADMIN. OFFICE OF THE ILL. CTS., 1978 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 62-63 (1978).

119. Reawakened Voters Rise to Oust Three Judges, Chicago Tribune, Nov. 6, 1986, § 2, at 8, col. 4; Illinois State Bar Association, 17 BENCH AND BAR 3-4 (Dec. 1986).

of Chicago were filled by candidates who ran unopposed in both the primary and general elections.<sup>120</sup> When a candidate is opposed in a primary contest, the candidate slated by party chieftains can expect to win. In fact, in the six elections prior to 1984, only six Democrats not slated by the party organization had won the Democratic primary election.<sup>121</sup> Only Democratic candidates are generally elected in the City of Chicago and county-wide. Only Republicans can expect to win the suburban-wide contests.<sup>122</sup>

Downstate the dominant party in each district or circuit also controls the election. In the 1986 judicial election, out of 48 races, 29 were without opposition from the minority party. Of the five appellate vacancies in the First District, three Democratic candidates ran without Republican opposition. In the 4th District appellate races, two Republicans ran for two slots without opposition. In the circuit court races, 10 of 17 Cook County (city) judgeships were filled by Democratic judges who ran without Republican contenders. Vacancies were filled in the 2nd, 9th, 11th, 14th, 15th, 16th and 18th circuits by Republican candidates who had no Democratic opposition. One of the vacancies in the 4th circuit and one in the 20th circuit went to unopposed Democratic candidates.<sup>123</sup>

Judges seeking retention in Illinois run on their records. Retention elections are non-partisan and the judges run unopposed. This is an innovation that usually accompanies merit selection. Of the states using retention elections, Illinois is the only state that does not have

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120. *Let's Select Judges on Their Merit, Not Their Politics*, *supra* note 97.

121. Wheeler, *supra* note 97. Lawyers who rate party endorsements usually have worked tirelessly for their party. Racial and ethnic considerations also play a role. *Id.* See also Nicholson & Weiss, *Funding Judicial Campaigns in the Circuit Court of Cook County*, 70 JUDICATURE 17, 18 (June-July 1986). After the 1984 primary election, it began to look like the Cook County Central Democratic Organization had lost some of its control. It had endorsed six judges for the circuit court and five of them had lost. *Merit Selection Heats Up*, Chicago Tribune, Oct. 13, 1985, § 2, at 18, col. 1. But in the 1986 election, Judge McDermott, a friend of Alderman Edward Vrdolyak (the Cook County Democratic Chairman) was a shoo-in for retention to the circuit court after being slated by the party in the city election. This was despite allegations that he was a traffic court fixer. *McDermott Election Builds a Case for Change*, Chicago Tribune, Nov. 25, 1986, § 1, at 1, col. 3.

122. *Let's Select Judges on Their Merit, Not Their Politics*, *supra* note 97.

123. Information compiled from the Illinois State Bar Association, 16 BENCH AND BAR 1-3 (May 1986). On occasion judges have been elected who utilized the petition procedure to have their names put on the ballot. Most noted are Supreme Court Justices James Dooley and William Clark. Both of those Justices defeated candidates backed by the Democratic machine in 1976. Lousin, *The 1970 Illinois Constitution: Has It Made a Difference?* 8 N. ILL. U.L. REV. 571, 621 (1988).



merit selection commissions.<sup>124</sup> The purpose of retention elections is twofold: 1) to “allow the electorate to remove judges who, after a short period of service, have proved themselves incapable of competent performance on the bench,”<sup>125</sup> and 2) to ensure an independent judiciary. The retention process is said to ensure accountability, but by focusing voter attention on the judge’s competence rather than his or her party label.<sup>126</sup>

Upon closer inspection, however, it is clear that the retention method only minimally serves the accountability function. Incumbent judges are almost never defeated. In the 17 years since the 1970 Constitution went into effect, only 13 judges have not been retained. Of the 566 judges who sought retention, 553 or 99.98% percent kept their seats. No supreme or appellate court judge has ever lost a retention bid. In the 7 elections that were held, the mean affirmative vote was 74.6%.<sup>127</sup> This indicates that approximately three out of four voters voted for retention of a particular judge.

Illinois figures are consistent with the findings of a recent study which focused on each of the retention elections held in the trial courts of 10 states for the time period 1964-1984 (Illinois was among the 10 states). For the 1,864 elections studied, the mean affirmative vote was 77.2%. Only 22 judges were defeated throughout this period. Researchers concluded the following: (1) retention elections serve to insulate judges from popular control; (2) voters do not generally differentiate much between judges, therefore judges usually suffer defeat only after a concerted effort is waged against them; (3) judicial retention elections are characterized by low voter turnout; and (4) judicial retention elections fail to provide cues to help voters in the voting booth. Voters generally voted positively as an indication of their trust in the political system.<sup>128</sup>

With regard to the claim that elected judges are accorded more legitimacy than judges chosen under a merit system, again the claim appears to be fallacious. A Yankelovich, Skelly and White Polling Organization 1977 national survey of public and legal professionals’ attitudes toward the courts indicated that public confidence in the

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124. Lermack, *supra* note 103, at 11.

125. P. DUBOIS, *supra* note 87, at 17.

126. *Id.*

127. Compiled from ADMIN. OFFICE OF THE ILL. CTS., ANNUAL REPORTS TO THE SUPREME COURT OF ILLINOIS (1974, 1976, 1978, 1980, 1982 and 1984); and Illinois State Bar Association, 17 BENCH AND BAR 3-4 (Dec. 1986).

128. Hall and Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340-47 (April-May 1987).

courts with regard to efficiency, fairness and responsiveness is unaffected by the type of formal selection system being utilized. Within each of three areas of comparison, the mean responses of each category of respondent was remarkably similar across the four types of judicial system studied. For example, with regard to fairness (frequency that judges are biased and unfair), the mean figures for the general public in appointment, merit, partisan and non-partisan states were 2.7, 2.6, 2.7 and 2.6, respectively.<sup>129</sup>

Are women and minority constituencies treated more favorably due to the use of the election method of selection of judges? Supporters of partisan elections argue that the method is more responsive to minorities and women, both because judges running for office in areas with heavily concentrated minority/female populations need their support and because more minorities and women are likely to ascend to the bench in these areas.<sup>130</sup>

At first glance there appears to be some support for this argument. Harold Washington, the former Mayor of Chicago, did hold the key to the ascendancy of a number of judges to the bench during the 1986 judicial primary election. Several of the candidates he endorsed won against sitting judges endorsed by the regular Democrats. Further, there is at least a perception that some Democratic judges ruled in Washington's favor in politically sensitive cases in order to win the black vote.<sup>131</sup>

With regard to representation of blacks on the bench, R. Eugene Pincham, a black appellate judge from the First District, argued in a recent column in the Chicago Daily Law Bulletin as follows:

In the 35 years I have been a member of the bar, blacks have increased their numbers on the bench from one to 40 [in Illinois]. There are now 40 blacks on the bench out of almost 380. Most of us who have been denied the opportunity, we figure that when the process is about to begin to work for us, when it has taken us 200 years to teach blacks to exercise their franchise, when the black community is about to come to

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129. Wasmann, Lovrick, & Sheldon, *supra* note 88, at 173-183.

130. *Minority Bar Group Fears Bias in Merit Selection of Judges*, Chicago Tribune, April 22, 1987, § 2, at 2, col. 1; *Merit Selection Discriminates Against Minorities, Women: Pincham*, *supra* note 113.

131. *Politicians Not Exactly Friends of the Court as Judges Fight for Retention*, *supra* note 103. In the retention election that fall, Washington urged a "no" vote for Judges Rosin, Salerno, Zimmerman and Grupp. Rosin and Salerno were defeated. Zimmerman and Grupp just slipped by. *Reawakened Voters Rise to Oust 3 Judges*, Chicago Tribune, Nov. 6, 1986, § 2, at 8, col. 4.



power literally, we perceive this as another means of changing the process [referring to merit selection] and I don't hold to it.<sup>132</sup>

Pincham's comments, however, have little application outside of Chicago. In other areas of the state, blacks do not have a sufficient population base to maintain substantial control over judicial elections.

Women have not been known to vote as a block in judicial elections. The election method has served as a barrier for them.

Historically, women have always had a more difficult time in fundraising than men. . . . And while one would like to think that money would not determine such elections, campaign spending in judicial elections, like all other elections, is clearly a significant factor. . . . Beyond that, women judicial candidates face enormous problems overcoming stereotypes; the typical voter does not think a woman looks like a judge.<sup>133</sup>

We must also question whether we really want a black political machine controlling our judiciary any more than we want the old Democratic regulars doing so. Do we want judges ruling a certain way because of fear of the black electorate anymore than we want them to rule a certain way because of fear of the white electorate? In the same campaign in which Mayor Washington wielded so much political muscle, little green campaign buttons with a white gavel and the words "Retention Vote No" were distributed by some organizational Democrats. They were designed to intimidate judges on the bench into siding with the machine in political cases rather than with Washington. Democratic regulars were particularly interested in ousting Judges Joseph Schneider and Arthur Dunn. Both had decided hotly contested political cases resulting from partisan battles between Mayor Washington and Alderman Edward Vrdolyak. Schneider ruled against Vrdolyak forces by barring a referendum on a proposed non-partisan mayoral election. Dunn ruled in a key case that gave the Mayor control over Chicago City Council Committees. Although both Schneider and Dunn were retained, their approval margins (seventy-seven percent and seventy-one percent) were lower than those of previous contests. Judge Schneider, who previously had been silent on the question of the selection method of judges emerged as a merit

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132. *Merit Selection Discriminates Against Minorities, Women: Pincham*, Chi. Daily L. Bull., Oct. 3, 1986, at 36, col. 1.

133. Scott, *Women on the Illinois State Court Bench*, 74 ILL. B.J. 437-38 (May 1986).

selection proponent as a result of what he had been through.<sup>134</sup> Further, it remains to be seen what effect Washington's death and Sawyer's ascendancy to power will have on the black voting block.

Whatever the selection method, prejudice has been and may continue to be for some time a significant limitation on the number of blacks and women who become judges. Recent studies have shown, however, that women and minorities are more likely to make it to the bench in states where judges are appointed by a chief executive or under a merit model than in election states. For instance, in a 1985 nationwide study conducted by the Fund for Modern Courts in New York, it was shown that 17.9% of all judges are women and minorities in appointment states; 17.2% are women and minorities in merit selection states; and only 11.1% are women and minorities in partisan election states. In Illinois 11.7% of the judges are women and minorities.<sup>135</sup> The Fund for Modern Courts' study was the first nationwide demographic survey to correlate the gender and race of judges to the different means through which they were selected. It demonstrated that, in comparison to merit selection states, Illinois lags way behind.

In summary, there is no indication that judicial election in Illinois holds judges any more accountable to the public than another method might. Nor does it increase the public's perception of the legitimacy of the court system to have judges elected. In Chicago, the election method in recent years has given black voters a greater role in judicial selection than ever before, but this development may or may not continue and has not filtered down to the rest of the state. Women have not fared as well, and from looking at the experiences of other states, women and minorities can be expected to fare better under a merit selection system.

### C. INDEPENDENCE

Judicial independence refers to "the freedom of the judge from any external influences which might impair his or her *impartiality* toward the opposing litigants and his or her ability to decide each

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134. *Politicians Not Exactly Friends of the Court As Judges Fight For Retention*, *supra* note 103; *Reawakened Voters Rise to Oust 3 Judges*, *supra* note 131; *Eight Judges Don't Rate with Bar Group*, *supra* note 101.

135. Stille, *Election v. Appointment: Who Wins*, NAT'L L.J., Dec. 30, 1985-Jan. 6, 1986, at 1, col. 2. See also FUND FOR MODERN COURTS, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 62 (1985); Tokarz, *supra* note 105, at 903-51.



case on the merits.”<sup>136</sup> An independent judiciary is able to review cases, construe constitutional provisions and statutes, and develop common law without fear of requital by the voters or other branches of government. The principal is firmly ingrained in our legal tradition, and numerous mechanisms have been adopted in the federal and state court systems to give it effect. One safeguard of independence is the grant of immunity to judges so that they cannot be held civilly liable for decisions they make on the bench. Another is the grant of either life-time tenure to judges or longer terms of office than other public officials enjoy. A third is the adoption of a judicial merit selection/retention system.<sup>137</sup>

The judicial election method is seen as antithetical to preservation of judicial independence. Critics of the election method generally point to two concerns. First, they argue that when a judge secures a position on the bench due to the organizational and financial assistance of a political party, he or she will find it “almost impossible to resist completely the importunities of his [or her] creditors for payment through judicial favors.”<sup>138</sup> When a judge is beholden to particular individuals or an entire organization, impartial and objective decision-making is difficult, if not impossible, to maintain. Second, they point to the fact that the election method allows judges to be put into office and then removed from office based on the whims of current majorities. An important aspect of an independent judiciary is its ability to serve as a check on the excesses of popular majorities, particularly regarding their interference with the constitutional rights of political and social minorities.<sup>139</sup> When a judge has to fear an angry electorate, he or she is not free to decide a particular case on the law alone. Adoption of a merit selection/retention system is touted as a much better means of guarding judicial independence.

Illinois’ partisan elective selection system, as critics of that method assert, does work to undermine an independent judiciary. Judicial candidates have to campaign under a party label and proclaim allegiance to that organization and its set of political goals. To obtain party support, judicial candidates often have to have been party workers, they often become involved in reciprocal obligations to political sponsors and (it has been charged) buy the party’s endorsement.

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136. P. DUBOIS, *supra* note 87, at 20.

137. *Id.* at 27. See also Philipsborn, *On the Independence of Judges*, 62 ILL. B.J. 448-50 (April 1974).

138. L. MAYERS, *THE AMERICAN LEGAL SYSTEM* 3 (1964).

139. P. DUBOIS, *supra* note 87, at 26.

A recent court-appointed commission revealed in part the extent to which judgeships are awarded to party loyalists. The commission report noted, for instance, that 50 of 171 full circuit judges in Cook County are former committeemen, precinct captains, assistant precinct captains or ward officers.<sup>140</sup> It is well known that party loyalty influences the slating downstate as well, although a documented study on this question has not as yet been conducted.

Cook County Circuit Judge Charles E. Freeman's 1986 appointment of his campaign manager to a lucrative trusteeship is just one of the many examples of how political favors can be repaid. The fees paid to the trustee were expected to exceed \$200,000. Charges were lodged that the fees were excessive in light of the amount and complexity of the work he performed, and, as one might expect, concerns were raised about the propriety of the arrangement in the first place.<sup>141</sup>

Allegations that some judges actually pay for party endorsements surfaced following a study of judicial candidates' campaign fundraising activities, conducted by Marlene Nicholson and Bradley Weiss under the auspices of the DePaul College of Law. Nicholson and Weiss, looking only at 1984 Cook County circuit court elections, discovered that candidates frequently raised substantial sums of money, even when they ran unopposed in the primary and faced little or no opposition in the general election. Their research revealed that almost all of the money was collected after the deadline for the filing of petitions of candidacy, so the candidates knew they would not face any opposition.<sup>142</sup> Asked why this occurred, Robert Perkins, former President of the Chicago Council of Lawyers, said, "[i]t has been widely alleged for years that some of them are buying into slating."<sup>143</sup> Nicholson and Weiss verified that, of the money raised, sixty-five percent or more (generally \$10,000 per winning candidate) was transferred to either the Democratic Judicial Campaign Committee or the Democratic Central Committee in Cook County as an expense assess-

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140. *Study Verdict: Pick Judges By Merit*, Chicago Tribune, Oct. 11, 1985, § 2, at 1, col. 2. Political party activities are distinguished from holding public office before becoming a judge. As noted in Section III.A. of the text of this article, judges under election systems are no more likely to have held political office than judges in merit selection states.

141. *Judge Names His Campaign Manager to Trusteeship*, Chicago Tribune, Nov. 23, 1986, § 2, at 1, col. 2.

142. Nicholson & Weiss, *supra* note 121, at 20, 23-25.

143. *Judges Selection By Merit Gets a Boost*, Chicago Tribune, Oct. 14, 1985, § 2, at 1, col. 5.



ment. All indications were that the assessment fee greatly exceeded the actual costs of the donating judge's campaign.<sup>144</sup>

Someone has to supply campaign money to judicial aspirants. Generally it is lawyers who do so, because they are the only sizable group that has a real interest in the outcome. Nicholson and Weiss found that fifty-three percent of the itemized outside contributions that judges received came from lawyers and law firms.<sup>145</sup> Obviously other attorney contributions were also received but were not reported because they were amounts under \$150 and did not have to be itemized.<sup>146</sup>

Lawyers are most often in the best position to evaluate the integrity and competence of the judicial candidates, and they have a high stake in ensuring that the most qualified judges are selected. At the same time, however, attorney contributions create an obvious risk of undue influence. Judges have numerous opportunities in the course of litigation to make discretionary decisions that could benefit one side or the other. Knowledge of the contribution of even a small amount from one of the lawyers involved in a case could consciously or unconsciously predispose a judge to favor one litigant over the other. A supreme court rule was adopted to minimize the possibility that a conflict will arise.<sup>147</sup> It requires that campaign contributions be made to campaign committees rather than to judges individually. In theory, a judge is not supposed to know who makes the donations. In practice, however, the concept of anonymous giving has never really worked. Judges attend fund-raising parties and are often aware of their major contributors.<sup>148</sup>

Lawyers are mindful of this when they make contributions to judges' campaign committees. Therefore, they tend to give more heavily to the campaigns of sitting judges.<sup>149</sup> An expose by the *Chicago*

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144. Nicholson & Weiss, *supra* note 121, at 20, 23-25. Advertising was the chief expense. It averaged \$1,508 per judge for both the primary and general elections. *Id.* at 24.

145. *Id.* at 21-22. Candidates or their families often make loans from personal funds to the campaign or simply donate personal funds without an expectation of repayment. *Id.* at 18-20. Seventeen percent of the contributions came from corporate donors, 2.4% from unions and 31% from non-attorney individuals. *Id.* at 22-23.

146. Candidates for elective offices in Illinois are required by law to fill out a campaign disclosure statement if they accept or spend \$1,000 or more on their campaigns. They are also required to disclose the names and addresses of contributors of \$150 or more. ILL. REV. STAT., ch. 46, para. 9-11(4), 9-13(13) (1985).

147. S. Ct. R. 67, to be codified as ILL. REV. STAT., ch. 110A, para. 67 (1987).

148. *Reform of Judicial Campaign Urged*, Chicago Tribune, May 14, 1987, § 2, at 1, col. 2.

149. Nicholson & Weiss, *supra* note 121, at 22.

*Tribune* revealed that 11 judges on the ballot in Cook County in November of 1984 had accepted campaign contributions from lawyers who had cases before them during the year. Five of the judges received contributions from lawyers whose cases were pending at the time the contributions were made.<sup>150</sup> A current Illinois Supreme Court Justice came under fire the following year when he received \$59,000 in contributions from Illinois lawyers after the election was over. The money was raised to retire his campaign debt which was said to total \$110,000. At least one of the attorney donors had a case pending before the Illinois Supreme Court at the time of the contribution.<sup>151</sup> More recently, charges of improper conduct were lodged against five Illinois Supreme Court justices for presiding over the disciplinary cases of six prominent Chicago lawyers, each of whom had donated thousands of dollars to the justices' election coffers. Three of the judges indicated that they had no idea of who contributed to their campaigns and therefore no conflict existed. Each of the lawyers also denied impropriety.<sup>152</sup> Even though such practices are common, legal and do not violate any ethical rules, they are a real basis for concern.

There also can be no doubt that contributions by lawyers to judicial campaigns can result in Greylord type entanglements. Some Greylord judges granted favors to attorneys in cases for as little as \$50.<sup>153</sup> Others extorted money from lawyers in the guise of securing loans to repay campaign debts.<sup>154</sup>

Recently, the Illinois State Bar Association proposed a ban on political donations from attorneys to judges. One alternative it proposed would be for a state checkoff system to be adopted which would allow taxpayers to designate \$1 of their income tax payments to fund judicial elections.<sup>155</sup> Thus far, the proposal has received little support. Anything short of replacing the lawyer funding base with some other reliable source may force the judges into an even closer relationship with the political parties.

Rather than tinker with campaign financing rules, it appears as if a major overhaul of the selection/retention system is really what is

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150. *Study Verdict: Pick Judges By Merit*, *supra* note 140.

151. *Lawyers Refill Justice's Coffers*, Chicago Tribune, Aug. 6, 1985, § 2, at 3, col. 4.

152. *Report: Five Justices May Be Guilty of Misconduct*, STATE J. REG., Jan. 10, 1988, at 5.

153. *After California, What's Next for Judicial Elections*, 70 JUDICATURE 360 (April-May 1987).

154. *The Holzer Conviction*, Chicago Tribune, Feb. 20, 1986, § 1, at 26, col. 2.

155. *Obstacles Seen to Reform of Judicial Campaigns*, Chicago Tribune, May 19, 1987, § 2, at 3, col. 1.



needed. Even the retention elections, discussed earlier, which have gone a long way toward freeing incumbent judges from being beholden to political sponsors and insulating them from a sometimes intolerant and retaliatory public, are not providing judges with the independence that was anticipated. Former Chief Justice of the Illinois Supreme Court, William Clark, after running for retention in 1986, said that the election had taught him some valuable lessons:

I learned that judges who are running for retention are called upon by those who think the judges owe them a certain loyalty . . . That creates an unfortunate situation of the appearance of impropriety . . . The state legislature must take the opportunity to come up with a system that will eliminate the possibility of judges owing anything to anyone but the residents of the state as a whole.<sup>156</sup>

Further, competent and deserving judges have sometimes become the object of vile, negative, ouster campaigns. Most often they have been able to retain their offices. Of the 13 judges who have not been retained, all but four have either received less than qualified ratings by the bar associations or been accused of unethical or illegal practices.<sup>157</sup> Yet, the ouster of even one qualified judge for reasons other

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156. *Group Begins Big Push for Merit Selection*, Chi. Daily L. Bull., Feb. 10, 1987, at 1, col. 3.

157. The following is a list of the judges who have not been retained. Information is included as to the circuit where they served, the year of the retention election, and the reason given for their ouster.

1. Judge David Lefkovitz (Cook Co. Cir. 1976) (rated clearly unqualified by the Chicago Tribune and opposed by the Chicago Bar Association).

2. Judge Joseph Power (Cook Co. Cir. 1976) (accused of political favoritism during special grand jury investigation of 1969 police raid on Chicago Black Panther headquarters).

3. Judge William Ginos, Jr. (4th Cir. 1978) (accused of ethics violations for providing legal advice to jail inmates who later had cases before him).

4. Judge Albert Pucci (10th Cir. 1978) (he was 68 years old and had been ill and off the bench much of the time).

5. Judge Charles Iben (10th Cir. 1978) (accused of insensitivity, incompetence, arrogance, lack of judicial temperament and of being too soft on criminal defendants).

6. Judge John Boyle (Cook Co. Cir. 1978) (opposed by the Chicago Council of Lawyers because of abuse of his chief judge's assignment powers in the handling of politically sensitive cases).

7. Judge John DeLaurenti (3rd Cir. 1980) (subject of negative press campaign. Allegations that he was "soft" on criminals were made. He was rated as qualified by the Illinois State Bar Association and the Tri-City Bar Association, and he received the endorsements of area law enforcement officials and a broad based coalition of

than his or her capabilities is unfortunate and unnecessary. The possibility that a smear campaign can be mobilized against a judge may create needless tensions and stress for even the most principled, conscientious and strong-willed of judges. As one legal writer put it

[c]ourage and independence of judges are imperatives in a free society because judges have to *decide* and they have to decide *promptly*. Since they are human beings, they have to be free to be wrong, to make mistakes, to commit error. That is why we have courts of review. If judges must decide cases and controversies under the dread of harassment or removal from office for undefined and unforeseeable mistakes, then Orwell's "1984" will not be 10 years away; it will be just around the corner.<sup>158</sup>

The merit selection processes in use in other states do not serve perfectly the value of judicial independence. Most obvious is the

area lawyers).

8. Judge Victor Mosele (3rd Cir. 1980) (subject of the same negative campaign as Judge DeLaurenti and the same allegations were made against him. He also was rated as qualified by the respective bar associations, the law enforcement community, and many area lawyers).

9. Judge David Babb (17th Cir. 1980) (given a "not recommended" rating by the Illinois State Bar Association. Target of a citizens' organized campaign because he had sentenced the father of a child abuse victim to probation and a fine. The four month old boy had been left deaf, blind and brain damaged as a result of the beating).

10. Judge Jose Vasquez (Cook Co. Cir. 1982) (subject of an investigation by the Illinois Judicial Inquiry Board for allegedly directing defendants in his courtroom to hire a private attorney he had chosen. He was also criticized by State's Attorney Daley for not allowing juveniles charged with violent crimes to be tried as adults.).

11. Judge Lawrence Passerella (Cook Co. Cir. 1986) (ousted for acquitting a man of beating up a female police officer).

12. Judge Allen Rosin (Cook Co. Cir. 1986) (opposed by the bar associations because of Greylord charges).

13. Judge Frank Salerno (Cook Co. Cir. 1986) (opposed by the bar associations because of Greylord charges).

See Lermack, *supra* note 103, at 12-13; *Reawakened Voters Rise to Oust 3 Judges*, *supra* note 119; *Eight Judges Don't Rate With Bar Groups*, *supra* note 101. *Reform of Judicial Campaign Urged*, Chicago Tribune, May 14, 1987, § 2, at 1, col. 2; Nicholson § Weiss, *supra* note 121, at 22; *Voters Oust Boone County Judge*, Chicago Tribune, Nov. 6, 1980, § 1, at 13, col. 1; *Vasquez May Lose Judgeship*, Chicago Tribune, Nov. 4, 1982, § 1, at 17, col. 1; *Voters Oust Two Circuit Court Judges*, Alton Telegraph, Nov. 5, 1980, at 1; *Question of Ethics for William A. Ginos, Jr.*, Hillsboro Journal, Nov. 7, 1978, at 1.

158. Doherty, *Judges Are Not Second-Class Citizens*, 62 ILL. B.J. 274, 278 (Jan. 1974).



threat posed by executive control of the selection phase. Research has shown that governors use judicial appointments as rewards and have no inhibition about attempting to get their political supporters nominated. Appointed judges are most often of the political party of the executive that appointed them.<sup>159</sup> The problem is compounded when a governor appoints both nominating commission members and judicial candidates. In Illinois, it could be exacerbated even more because there is no constitutional limitation on the number of terms that a governor can serve. The inclusion of certain provisions in the merit selection model could, however, reduce dominance by the governor. Politicking might still occur, but its nature and impact would be of a significantly different character.

To minimize the possibility that candidates will become beholden to the governor or the governor's political party, nominating commission members can be chosen on a bipartisan basis by persons other than the governor. Current proposals call for majority and minority leaders of the legislature to appoint all lay members. Others would divide the responsibility among the highest ranking constitutionally elected officers of different parties.

Provisions that the governor make his choice from among three qualified nominees given to him by the bipartisan commission should foster choices based on merit rather than political party identity. As another means of controlling the partisan nature of the appointment, the plan can call for nominee names to go forward only when a three-fifths vote of the commission members can be achieved. Restricting nominating commission members to fixed terms and preventing them from succeeding themselves will also help protect independence in the selection process.

Studies of merit states have shown that politics can pervade the pre-selection process in two other ways. First, there is often competition among various groups for representation on the nominating commissions. For example, rival bar associations reflecting distinct status groups and socio-economic and political interests often campaign for the election of their members. This type of politicking, however, provides an indirect form of accountability and does not undermine judicial independence. Competing bar group members are generally elected in almost equal numbers, and their perspectives on judicial selection are shaped to a great degree by the kinds of clients they serve.<sup>160</sup>

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159. Tokarz, *supra* note 105, at 941-946.

160. Watson, Downing, & Spiegel, *Bar Politics, Judicial Selection and the Representation of Social Interest*, 61 AM. POL. SCI. REV. 54-71 (1967).

A second method of politicking often occurs when competing judicial aspirants, or others on their behalf, lobby commission members. This problem can be anticipated and may be minimized or even eliminated by the following: (1) articulated standards for evaluating judicial candidates which emphasize merit and competence; (2) education and training for commission members to enhance their expertise in interviewing and assessing the candidates; (3) uniform interviewing, screening and voting procedures; (4) bans on commissioners receiving communications directly or indirectly from the governor and others; and (5) a requirement that commissioners record all written and oral communications with outsiders.<sup>161</sup>

The post-selection stage is more problematic. Retention elections, generally considered to be a critical element of a merit selection model, have actually worked to keep almost all incumbents in office. In contrast to elected judges, judges selected under a merit plan are much less beholden to the interests of political parties and others, and they also do not have to repay nominating commission members or the appointing authority for their continued appointment. In theory, once they are in office, they are accountable only to the electorate via the retention process.

As has been demonstrated in Illinois, retention elections have not insulated judges from smear campaigns and intentional harassment and intimidation by political parties and other interest groups.<sup>162</sup> Protection from the kinds of abuses seen in the Passarella, Schneider and Dunn retention bids can only be achieved through adoption of review commission provisions of the kind proposed by the Task Force, Dunn, Netsch, Ronan and Farley models. Under each of these proposals, only judges whose performance is found to be unacceptable by separately constituted, fixed-term review commissions would have to campaign for retention.<sup>163</sup> Qualified judges would be reappointed after periodic review, and judges found to be wanting by commission standards could appeal to the voters to remain in office.

## V. CONCLUSION

The 1964 and 1970 reforms of the judicial article of the Illinois Constitution did not go far enough. Left in place was an outdated, unworkable and at times corrupt partisan judicial election system. Dissatisfaction with the election of judges has continued to surface

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161. Tokarz, *supra* note 105, at 946-50.

162. See *supra* text accompanying notes 118-19, 131-34, 157.

163. See *supra* text accompanying note 83.



year after year. The Greylord investigation only served to fuel the fire for change to a merit selection method. In the past, merit selection proponents have pursued two different avenues for change. However, they have not succeeded either in setting up a merit system for filling vacancies or putting a constitutional amendment to the voters. Now, while continuing to pursue these means, a third avenue is available to them by calling for a constitutional convention.

The chief reason the politicians have opposed merit selection is that it would diminish their power over the composition of the state's courts. Concerns from minority groups and women that the appointive procedure would leave them out, as well as the divisiveness of proponents for merit selection, have also helped sink merit selection proposals in the past.<sup>164</sup> Current plans, however, have a better chance for success.

The Cook County Regular Democratic Organization's power over the selection of judges has increasingly eroded. Some regulars and long-time opponents of merit selection, such as Representative Al Ronan, have even joined the ranks of the appointment proponents. Also, a number of the merit plans incorporate the local option feature

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164. *How to Get Merit Selection Enacted*, Chicago Tribune, Feb. 13, 1987, § 1, at 18, col. 1.

It is interesting that the Illinois Supreme Court has failed to establish a merit system for the filling of vacancies, even though a majority of the justices have stated they favor merit selection. Currently the Supreme Court fills vacancies itself, allocating appointments among its members. It has authority to develop any process that it chooses when making appointments. The Chicago Council of Lawyers and Chicago Tribune editorial staff asked last year that the court exercise leadership and adopt a merit selection method. *Lawyers Urge Merit Selection*, Chicago Tribune, Sept. 11, 1987, § 2, at 3, col. 1; *An Opportunity for Judicial Leadership*, Chicago Tribune, Sept. 15, 1987, § 1, at 14, col. 1.

With the recent resignation of Justice Seymour Simon, the issue has really heated up. The Chicago Bar Association and a group called the Cook County Court Watchers have joined the fray specifically requesting the Illinois Supreme Court to use merit selection in filling that vacancy and others that arise in the appellate and circuit courts. In its petition, the Chicago Bar Association even asked that the nominating commissions be representative of the populations (e.g. by race and sex) in each judicial district or circuit. Since the Supreme Court already altered its appointment process by using a formal application process for the first time in the history of the court, it is unlikely that the courts will be responsive to this recent pressure. The court may, however, pay attention to the resolution of the Cook County Bar Association calling for the appointment of a black. Illinois has never had a black or a woman on its highest court. *High Court Should Make Appointments*, STATE J. REG., January 29, 1988, at 6, col. 1; *Fill Vacancy with Black, State Supreme Court Urged*, STATE J. REG., Feb. 7, 1987, at 6, col. 1.

for the first time. The local option should appeal to downstate and suburban lawmakers who favor the current system

Whether minority/female representation under a merit appointment model is, in reality, a problem is debatable. However, the fact that there is opposition to merit selection, particularly by black lawyers and politicians, is not debatable. To allay the fears of minorities and women, some of the proposals have incorporated equal opportunity language. For example, the Task Force plan specifies that, in regard to commission nominations to the governor, the following language would control:

“recommended for appointment” means persons who by their character, background, temperament, professional aptitude, experience and commitment to equal justice under the law are deemed by the Commission to be best qualified to fill the vacancy. All such persons shall have the right to be considered for selection by a Judicial Nominating Commission free from discrimination on the basis of race, color, creed, national ancestry or sex.<sup>165</sup>

Still, it is doubtful that unenforceable, broad, equal opportunity language of the kind offered in these plans will appease minority and women's concerns.

Karen Tokarz, in a recent article on women judges under the Missouri merit plan, observed that women are often excluded from the nomination and appointment process. Missouri has never had a woman governor and no woman has ever participated in the appointment of judges or the selection of lay members to the nominating commissions. No woman lawyers have ever been elected to any of the nominating commissions either. To increase the likelihood that women and minorities are appointed as judges, she recommended that merit plans contain provisions to ensure that nominating commissions include female and minorities members.<sup>166</sup>

Ronan's “pilot” merit selection model also might help. It allows merit selection to be tried in the circuit courts and then either retracted five years later by the General Assembly or extended to the higher courts. If it turns out that the merit system has not been responsive to women and minorities, legislators could throw the system out or alternatives could be explored before it is extended to the appellate and supreme courts.

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165. Task Force on Judicial Merit Selection, *supra* note 61, at § 12.1(d).

166. Tokarz, *supra* note 105, at 937, 948.



Bickering among proponents about which system comes the closest to perfection is a real concern. The Illinois State Bar Association is solidly behind the Dunn plan at present.<sup>167</sup> The Ronan model has received the praise of Frances Zemans of Project Merit Selection of Judges.<sup>168</sup> The Chicago Bar Association is squarely behind Farley's resolution.<sup>169</sup> Netsch's plan has the backing of Cook County State's Attorney Richard Daley, U.S. Attorney Dan Webb, Senator Bob Kustra (R. Des Plaines) and Representative John Dunn (D. Decatur) who is himself the lead sponsor of House Joint Resolution 20.<sup>170</sup>

Even the Governor's Task Force, set up especially for the purpose of bringing the proponents together, has run into difficulty gaining acceptance for its plan. House Speaker Michael Madigan (D. Chicago) has indicated he will oppose any proposal giving power to the governor to appoint judges. Democrats maintain a 67-51 majority in the House.<sup>171</sup> Senator Dawn Clark Netsch (D. Chicago), a long-time supporter of merit selection and co-sponsor of another merit bill, although agreeing in substance with the Task Force proposal, believes it is doomed to fail since it does not contain a local option provision. She pointed out that although she prefers implementation of a merit method statewide, "crass political realities" dictate otherwise. According to her, since downstate voters view the election of judges as a Cook County problem, downstate support for any merit plan will depend on this option.<sup>172</sup>

With seven different proposals pending, compromises are obviously going to have to be struck. It will be worth the effort. Although there is no definitive evidence that judges selected under a merit method are more qualified than elected judges, we do know that the election/retention method does not make judges as accountable to the public as its proponents like to argue. Accountability is more likely

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167. *ISBA Approves New Merit Selection Plan*, *supra* note 5. (on March 4, 1988, the I.S.B.A. Board of Governors voted also to support the Governor's Task Force bill. In previous legislative sessions, the I.S.B.A. has taken the position that it would not stand in the way of worthy competing selection models).

168. *Bill to Seek Merit Selection*, Chicago Tribune, Mar. 3, 1987, § 2, at 1, col. 15.

169. *Chicago Bar Offers Merit Selection Plan*, Chicago Tribune, Oct. 25, 1985, § 2, at 3, col. 1.

170. *Selection of Judges by Merit Proposed*, Chicago Tribune, Mar. 23, 1985, § 1, at 6, col. 1.

171. *Selection of Judges On Merit Gets Boost*, Chicago Tribune, Mar. 4, 1987, § 2, at 2, col. 5.

172. *Merit Selection of Judges Putting State Task Force to the Test*, Chicago Tribune, June 16, 1987, § 2, at 8, col. 1.

to be to party sponsors and campaign contributors. We also know that judicial independence is sacrificed under such a system. Although the merit selection process is not without flaws, a carefully structured model could further quality selections, provide for indirect accountability and guarantee judicial independence. To achieve these goals, several features of a merit model cannot afford to be compromised. Chief among them are provisions calling for politically balanced and representative nominating and review commissions. To ensure that women and minorities are included in commission membership, a provision in the plan might specify that commissioners "shall reasonably reflect the diversity of the populations in each judicial district and circuit."<sup>173</sup> Alternatively, it could require that a minimum number of the members be minorities and women.

Eleven member commissions seem reasonable. The Task Force proposal which calls for 15 members in Cook County and 11 on downstate commissions is too convoluted. Six members should be lay persons and five lawyers. Judges should not serve as members. To ensure that the people maintain as much control over the process as possible, lay members should be in the majority. They can also help prevent bar politics from dominating the process and add a consumer perspective. Lawyer membership is needed because lawyers are in the best position to evaluate the applicants' background and suitability for judicial service. Past research indicates that when judges serve on nominating commissions, they wield the most influence. Lawyer members frequently are unwilling to go against the advice or advocacy of judges, particularly when they may have to appear before them in court. Lay members are often in awe of judge commissioners.<sup>174</sup> Although judges can provide insight concerning the workings of the court, there is greater value in ensuring that commission members are free to pursue their own viewpoints.

Subject to the restrictions mentioned earlier, the appointing authority should be the governor. If the supreme court were the appointing body, it would unduly politicize the court and run counter to the value of judicial independence. Further, there is a need for the appointing official to obtain varied opinions concerning the problems

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173. The Chicago Bar Association recommended such language in a proposal it made to the supreme court for the filling of the current vacancy on the supreme court by use of a merit plan. *High Court Should Make Appointments*, STATE J. REG., Jan. 29, 1988, at 6.

174. ILLINOIS STATE BAR ASSOCIATION, INITIAL REPORT OF THE SPECIAL COMMITTEE ON JUDICIAL MERIT SELECTION TO THE ILLINOIS STATE BAR ASSOCIATION BOARD OF GOVERNORS 22 (1981); Tokarz, *supra* note 105, at 938.



of the courts and the needs for representation on the bench of various segments of the communities. Judges have no traditional or convenient means of engaging in a dialogue with the community or the press. The governor would be in a good position to entertain this discussion.

The current retention system needs to be reworked. Proposed judicial review commissions, coupled with retention elections, are deserving of a try. The goal should be to require merit selection of *all* Illinois judges, even if political realities may dictate turning to local options and/or the adoption of an evolutionary process. Any proposal which is passed should allow for expansion of merit selection to other courts and to other locations within the state without further constitutional reform.





# Illinois Home Rule and Taxation: A New Approach to Local Government Enabling Authority

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THOMAS KELTY\*\*

The single most drastic change in the 1970 Illinois Constitution, and that document's most important contribution to the art of government, was the home rule provision contained in its local government article. It set forth a basis for changing the state's philosophy regarding the establishment of municipalities, and provided major impetus for moving Illinois municipal law out of the confines of 19th century ideology.

The 1870 Illinois Constitution was largely silent on municipalities; most significantly, it placed no limits on the authority of the state legislature to structure or restrict the operations of such government.<sup>1</sup> By so doing, it clearly established the tradition that municipal governments should be agencies of limited powers fully subordinated to the state legislature. This fit the patterns of the era: citizens were distrustful of all governments, but especially of municipal governments, which had been riddled by corruption. The operative principle which emerged, and was later reinforced by the judicial doctrine of Dillon's Rule,<sup>2</sup>

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1. G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 250, 499 (1969).

2. Dillon's Rule is a legal concept, first articulated by the Iowa courts and later applied by the courts in each state. Dillon's Rule states, in effect, that municipal corporations had only those powers specifically granted them by statute and those necessarily implied from the granted power. The rule was classically applied in *Trenton v. New Jersey*, 262 U.S. 182 (1923). See D. Kennedy, *Legal Services and Regulatory Procedures*, in *MANAGING THE MODERN CITY* 403 (J. Banovetz ed. 1971); J. DILLON, *A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS*, § 237 (5th ed. 1911), See also BRADEN AND COHN, *supra* note 1, at 499.

was that municipal governments, indeed all local governments, could be entrusted only with narrow grants of authority, strictly construed.

That 19th century concept was rejected in the 1970 document for those Illinois local governments which have acquired home rule power pursuant to the provisions of Article VII.<sup>3</sup> For those governments, 106 at most recent count, an entirely new legal concept has been created, one which markedly alters the historic relationship between the state, especially the state legislature, and units of local government.<sup>4</sup> The purpose of this essay is to assess the operational consequences of this new concept as it has developed in Illinois, and the implications of the Illinois experience for municipal enabling legislation.

### I. THE HOME RULE CONCEPT

The concept of home rule itself is not new. Indeed, it dates back to 1875 when Missouri made such powers available to its cities with populations of over 100,000.<sup>5</sup> Efforts to secure home rule for the city of Chicago date back even earlier. Chicago's efforts to obtain greater freedom from state legislative control led to the provision in the 1870 Constitution which required that all laws affecting municipalities must be of "general application."<sup>6</sup> This was followed, in 1872, by the passage of the state's first general municipal corporations act, which was viewed at that time as the most effective and flexible general municipal charter law in the nation.<sup>7</sup>

"Home rule" became the term used to describe Chicago's efforts to gain greater freedom from state legislative control. Efforts to

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3. ILL. CONST. art. VII, § 6. These home rule provisions apply only to counties which elect a chief executive officer on an at-large basis; cities and villages with populations of 25,000 or more (unless subsequently discontinued by referendum); and other cities and villages in which the voters have adopted home rule powers by referendum. All other counties, cities, villages, and all other units of local government in Illinois continue to operate under the statutory provisions enacted under the 1870 Illinois constitution, and as subsequently amended. Thus, the principles of narrow interpretation of statutory principles (Dillon's Rule) continue to apply to all such governments.

4. R. Kustra, *The Formulation of Constitutional Home Rule in Illinois* (1981) (unpublished Ph.D. dissertation on file in University of Illinois Library, Urbana, Illinois).

5. S. Cole, *Illinois Home Rule in Historical Perspective*, in *HOME RULE IN ILLINOIS* 11, 14 (S. Gove and S. Cole eds. 1978).

6. ILL. CONST. of 1870 art. IV, § 22(10).

7. D. Smith Canfield, *Illinois Home Rule and American Democracy: A Study of Anticipations, Consequences, and Prospects for the Future* 101 (1979) (unpublished Ph.D. dissertation on file in Northern Illinois University Library, DeKalb).



secure legislative authorization for Chicago home rule failed in 1904, 1907 and 1922. Downstate legislators were unwilling to grant the city such freedom. In part, their reluctance was a reaction to the perceived corruption of city politics, but, even more, the issue was political. As long as Chicago's legislative representatives had to bargain with downstaters for the authority needed to govern the city, the downstaters had a powerful position from which to secure legislative benefits for their own districts.<sup>8</sup>

The trend began to change in the 1950's, following the release of the Chicago Home Rule Commission's 1954 report which described home rule in legal rather than political terms.<sup>9</sup> The Illinois Municipal League began a study in 1955 which related home rule to the needs of cities and villages throughout the state. Local officials saw home rule as a means of gaining more flexible local powers, escaping restrictive court interpretations of local powers, and as some relief from the politics of the General Assembly, which had to approve every change in local government powers or structure. Thus, the stage was set when the Sixth Illinois Constitutional Convention convened in Springfield in 1970.<sup>10</sup>

The convention delegates ignored the traditional home rule format, which called for locally adopted charters through which local voters would prescribe the organization and powers of the municipal government. They recommended, instead, what has been termed "the most liberal" utilization<sup>11</sup> of the newer, residual powers system<sup>12</sup> (or what some have called a legislative supremacy model).<sup>13</sup>

Under the Illinois approach, a home rule government is authorized to "exercise any power and perform any function pertaining to its government and affairs"<sup>14</sup> which has not been denied to it by the state constitution or by state statute. This has been interpreted by the Illinois Supreme Court to mean that "[h]ome rule units . . . have the same powers as the sovereign except where such powers are limited

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8. *Id.* at Chapter III.

9. CHICAGO HOME RULE COMMISSION, CHICAGO'S GOVERNMENT: ITS STRUCTURAL MODERNIZATION AND HOME RULE PROBLEMS (1954).

10. The changes brought to the home rule debate by the Chicago Home Rule Commission's 1954 report are best summarized in Canfield, *supra* note 7, at Chapter III.

11. Cassella, *A Century of Home Rule*, NATIONAL GUIDE REVIEW, October, 1975, at 441, 448.

12. PREPARATORY COMM. PA. CONSTITUTIONAL CONVENTION, LOCAL GOVERNMENT-REFERENCE MANUAL 50 (1967).

13. Cole, *supra* note 5, at 16.

14. ILL. CONST. art. VII, § 6(a).

by the General Assembly. . . . [H]ome rule units . . . have an autonomy and independence limited only by restrictions imposed by the Constitution or authorized by it.”<sup>15</sup> The Constitution further directs that the “[p]owers and functions of home rule units shall be construed liberally.”<sup>16</sup>

Professor David C. Baum, legal counsel to the 1970 Constitutional Convention’s Local Government Committee, characterized the intent of the home rule provisions in these words: “The presumption relating to local powers is reversed with respect to home rule units: before, local governments were thought to possess no powers except those granted by statute; now they possess most governmental powers except those specifically denied to them by statute. . . .”<sup>17</sup> In his writings after the convention, Baum asserted that the framers’ intent, in setting up the provisions for legislative and judicial oversight of home rule, was to establish a system which provided for concurrent exercise of power by the state and by home rule units and which would avoid implied preemption by judicial decisions. The Illinois system, in Baum’s view, placed almost exclusive reliance on the legislature rather than the courts to keep home rule units in line.

The basic concept, of course, is that popular expectations of government have changed in the twentieth century. The concept of limited government was born in the colonial era—the notion that government governed best which governed least. In such a context, the notion that local government should have strictly limited powers was not surprising, and even the home rule charter approach was designed simply to transfer control over the limits of those powers from the state legislature to local voters.

The New Deal era of American politics changed public perceptions of government. Government began to be seen, not as an evil to be limited, but as a tool for improving human lives. With its change in perception came a change in demands for government action - and a change in the definitions of government power. The notion that the national government was an agency of delegated powers, for instance, was replaced by the view that the national government is able to exercise any power that state and local governments can exercise - in

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15. *City of Urbana v. Houser*, 67 Ill. 2d 268, 273, 367 N.E.2d 692, 694 (1977).

16. ILL. CONST. art. VII, § 6(m).

17. Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 138 (1972) [hereinafter Baum, *Part I*]; Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 561 (1972) [hereinafter Baum, *Part II*].



short, any power that is needed to respond to popular demands.<sup>18</sup>

Home rule, as used in Illinois, is a means for extending this new philosophy of governmental power to the local level. By providing broad enabling authority to local elected officials, Illinois home rule gives local governments the power to exercise any local power that is needed to respond to popular demands for government action.

## II. THE ILLINOIS HOME RULE EXPERIENCE

Home rule has received a very mixed reception in Illinois. Voters at the county level, where home rule has been linked to structural reform of county government, have soundly rejected the concept at every referenda opportunity.<sup>19</sup> Municipal voters have been more supportive; the aggregate number of voters at the municipal level favoring home rule has surpassed the number opposing it, although referenda to adopt home rule powers have failed more often than they have carried.<sup>20</sup> Perhaps most significantly, however, voters in communities which have had home rule have shown strong support for retention of those powers. There have been 26 referenda held to abolish home rule; home rule has been retained in 21 of these elections, and favored by voters, in the aggregate, by a 3-2 margin.<sup>21</sup>

The composite record of reaction to home rule by the state legislature and the state courts has been better. In the aggregate, both agencies have acted favorably toward home rule more often than not, but in neither instance have actions or reactions routinely favored home rule.<sup>22</sup> There are significant instances in which both the legislature and the courts have acted to impair home rule powers.<sup>23</sup> However,

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18. This concept of the rule of the national government, and the extent of the powers of that government, is now widely accepted by scholars. As applied to local governments, for example, it is summarized in P. PETERSON, *CITY LIMITS* 13 (1981).

19. See CENTER FOR GOVERNMENTAL STUDIES AT NORTHERN ILLINOIS UNIVERSITY, *COUNTY HOME RULE IN ILLINOIS*, (D. Beam, A. Pattakos, D. Tobies eds. 1977) [hereinafter D. BEAM]. See also, BANOVTZ AND KELTY, *HOME RULE IN ILLINOIS: IMAGE AND REALITY* 8-9 (1987) [hereinafter BANOVTZ AND KELTY].

20. See BANOVTZ AND KELTY, *supra* note 19, at chart on p. 8. Since the chart was developed, there have been more than a half dozen additional referenda; home rule has been rejected in nearly every recent election.

21. *Id.* (Since the chart on that page was devised, home rule has been retained in one additional city, Pekin).

22. D. BEAM, *supra* note 19, at 12 *et. seq.*

23. The principal legislative impairments were laws authorizing local government employees to engage in collective bargaining, specifying procedures for public access to municipal documents, and establishing a uniform state-wide minimum age for purchasing alcoholic beverages. The principal judicial impairment, discussed at

there is only one instance - state preemption of the power to set a minimum age for the purchase and consumption of alcoholic beverages - in which the legislature, the principal agency for protection against home rule abuse, has acted to correct problems attributable to the use of home rule powers.<sup>24</sup>

While much attention has focused on home rule issues in Illinois, relatively little has been paid to home rule accomplishments. Home rule was the source of the authority used in Oak Park, for instance, to achieve racially balanced residential neighborhoods. DeKalb used home rule powers to develop a special board to arbitrate disputes between landlords and their university student renters. Highland Park used home rule to develop low and moderate income housing; Bloomington and Normal used it to establish a joint mass transit system; Deerfield used it to innovate new methods of controlling juvenile vandalism; and Park Forest used it to develop a modern personnel system for municipal employees.

The most common use of home rule powers, however, has been to develop and finance local economic development programs. Sauget, for example, used home rule to expedite the marketing of industrial revenue bonds; cities such as Rock Island and Watseka have used it to help finance new industries and shopping centers; and Peoria and Galesburg have used it to help renovate their downtown business districts.<sup>25</sup>

The 1970 Constitution's framers, meeting in 1987 to assess their product after 16 years of experience, summarized their reaction to the Illinois home rule experience in the following words: "How has home rule worked? It hasn't succeeded in reducing the number of taxing bodies through consolidation as intended, but it has slowed their proliferation. It has also provided flexibility for popular choice, and has facilitated intergovernmental cooperation. On the whole, its use has been restrained."<sup>26</sup>

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length in this paper, was the decision in the Chicago Services Tax case which broadened the definition of occupation taxes (*Commercial National Bank v. City of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 227 (1982)). There have been other impairments, but these have been those which have been viewed as the principal threats to home rule principles.

24. D. BEAM, *supra* note 19, at 13.

25. Home rule users are summarized in BANOVTZ AND KELTY, *supra* note 19, at 4-11.

26. COMMITTEE OF 50 TO RE-EXAMINE THE ILLINOIS CONSTITUTION, THE 1970 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES (Draft Summary) 14 (1987).



Home rule accomplishments have largely been in the areas of economic development, local regulation, and program development. As important as these may be, they have attracted very little public attention, debate or opposition in Illinois. The home rule actions that have sparked controversy, and thus have fueled the opposition to home rule, have been actions relating to taxation.

The opposition to home rule in the constitutional convention centered largely on the fear that home rule would lead to burdensome taxes.<sup>27</sup> That same fear has played a major role in the defeat of home rule at the county level.<sup>28</sup> Indeed, taxation has been a dominant issue in all of the state's home rule referenda campaigns.<sup>29</sup>

Not only is taxation the dominant theme in referenda campaigns, but it has also been a major topic for legislative and judicial reaction to home rule. For instance, the Illinois General Assembly has not given home rule units the authority to levy taxes on income, earnings, or occupations. The Illinois courts have also been most concerned about municipal action in the field of taxation.

If there is any single issue which would lead to strong resistance to the home rule system of local enabling authority, that issue would be taxation. If there is any single area in which broad grants of authority to local governments would be unacceptable, that area would be taxation. If such grants of authority are not workable, that failure would manifest itself first in the area of taxation. Thus, it is the home rule record on taxation which will be examined in detail below.

### III. ENABLING AUTHORITY FOR TAXATION

#### A. THE TAXING POWER

There are three important elements in the determination of the home rule taxing power. The first is the grant of power itself: the power to tax was specifically enumerated in the constitution as a part of the grant of home rule authority.<sup>30</sup> Thus, subject to subsequent

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27. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1970, *Record of Proceedings*, Vol. VII, 1591, 1614, 1628 (1972).

28. D. BEAM, *supra* note 19, at 103-108.

29. BANOVETZ AND KELTY, *supra* note 19, at 16. While this source lists taxation as the second most frequently cited issue in home rule referenda campaigns, the concern over taxation was also universally at the root of concern over lack of trust in local officials. In simple language, voters who did not trust their local officials feared that such officials could not be trusted with local tax powers.

30. ILL. CONST. art. VII, § 6(a).

limitations imposed by law, home rule units were given broad, unspecified powers to enact taxes.

Second, the constitution established the following limitation on that power: "A home rule unit shall have only the power that the General Assembly may provide by law . . . to license for revenue or impose taxes upon or measured by income or earnings or upon occupations."<sup>31</sup>

Third, it was the framers' intent that it would be the Illinois General Assembly, and not the Illinois courts, that would act to place additional limits, if any, on the constitutional grant of power.<sup>32</sup> This was detailed in the constitutional provisions under which the General Assembly was authorized to preempt home rule power: it could, by a simple majority vote, provide for the exclusive state exercise of a power (presumably including the power to tax), or, by a three-fifths vote in each chamber, deny home rule units the authority to exercise a specified power.<sup>33</sup> Professor Baum described the intent of these provisions when he wrote, "the thrust of the Illinois provisions . . . favor concurrent exercise of power by the state and by home rule units and attempt to avoid implied 'preemption' by judicial decisions. The Illinois approach places almost exclusive reliance on the legislature rather than the courts to keep home rule units in line."<sup>34</sup>

The enabling provisions regarding home rule units' taxing powers, then, were designed to provide a broad grant of authority, but with the power to levy taxes on income, earnings or occupations limited to the scope of powers provided by the General Assembly, and with the presumption that additional restrictions on those powers would come only from the General Assembly.

## B. THE LEGISLATIVE REACTION

The General Assembly has not reacted at all to these constitutional provisions. This has had two quite different effects. First, and most important, the General Assembly has not acted to grant home rule units any new or added authority to impose taxes on income, earnings or occupations. This can be interpreted negatively, since it means that the General Assembly has not given home rule units taxing authority presumably intended for them by the constitution's framers.

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31. ILL. CONST. art. VII, § 6(e)(2).

32. See the statement attributed earlier to Baum, *Part II, supra* note 17, at 561.

33. ILL. CONST. art. VII, § 6(g), (h).

34. Baum, *Part II, supra* note 17, at 579.



Second, it has not acted to impose any added restrictions on the grant of home rule taxing power. This can be interpreted positively, since the General Assembly has made no move to limit home rule authority in this area.

Initially, the General Assembly's failure to act on income, earnings and occupations taxes was not surprising. The state had just enacted a state-wide tax on income and shared a portion of the receipts with local governments. Federal revenue sharing was enacted at about the same time, providing yet another new source of income for local units.<sup>35</sup> Local governments also had access to their traditional power to levy property taxes, and they had gained the authority to levy a sales tax in addition to their existing power to add a local levy to the state's retail occupation (sales) tax.

Yet, over time, and with the termination of federal revenue sharing,<sup>36</sup> the absence of power to tax incomes, earnings or occupations became increasingly restrictive, particularly for the City of Chicago. While home rule governments made increasing use of their new tax powers, none had the potential revenue-raising power of taxes which might be levied on income, earnings or occupations. The result led some observers to question the value of home rule:

The difficulties which continue to plague Illinois cities and counties are problems that probably cannot be solved under home rule as it currently exists. . . . The principal problem . . . may be the lack of revenue sources rather than the lack of regulatory authority. This problem probably cannot be solved under the current home rule provisions . . . . Progressive taxes that are truly proportionate to the taxpayer's ability to pay are not available under home rule. . . .<sup>37</sup>

Truly meaningful (i.e., productive) sources of new revenue have not yet been made available to home rule governments in Illinois.

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35. Federal revenue sharing was a program, enacted during the first term of President Richard M. Nixon, under which a designated sum of money was distributed annually to state, county, municipal, and township governments. Distributions were based on a formula which took into account, for each such unit, the socio-economic status of its residents, the wealth of local tax bases, and local tax effort. Poorer communities received substantial revenues from this source; wealthy communities, particularly in suburban areas, received relatively little.

36. Revenue sharing for states was terminated during the first term of President Reagan; revenue sharing for local governments was terminated during Reagan's second term.

37. R. Michael & J. Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 602.



### C. THE MUNICIPAL RESPONSE

Home rule opponents predicted, and some have even claimed, that home rule governments would use their broad taxing powers to levy new, burdensome taxes on their residents. In their view, such broad taxing powers would provide a temptation that local officials would be unable to resist, and local taxpayers would be forced to pay the price of too much government power.

This prediction has not been borne out in practice, however. While it is true that many new taxes have been levied with home rule authority, it is also true that 40% of all home rule governments have not used their home rule taxing powers at all.<sup>38</sup> Fewer than 20% of home rule governments have increased their property taxes above the statutory limits imposed on non-home rule governments.<sup>39</sup>

Instead, what has happened is that local communities have used their home rule powers to institute an array of new taxes designed to shift the tax burden from local property taxes to taxes that are paid by non-residents as well as residents of the community. Home rule powers have been used to impose local taxes on the rental of hotel and motel rooms, on the sale of alcoholic beverages and cigarettes, on tickets to spectator events, on the sale of gasoline, on retail sales, on the sale of food and beverages in restaurants, on the sale of new motor vehicles, on the transfer of title to real estate and on mobile homes.

In general, such taxes have been levied when the burden of their incidence would fall primarily on non-residents of the community. Cities with large regional shopping centers, for example, are most likely to levy a retail sales tax;<sup>40</sup> cities with many transient visitors are most likely to tax the sale of gasoline and restaurant food and beverages.<sup>41</sup> Home rule communities with large hotel/motel complexes

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38. The material on taxation in this section is reported in more detail in BANOVEZ AND KELTY, *supra* note 19, at 6, 10, 18 *et. seq.*

39. *Id.* at 21.

40. Voters in Mt. Vernon, for example, adopted home rule when local officials promised that they would use home rule powers to adopt a local sales tax. Mt. Vernon is a regional shopping center; its stores attract residents of many adjacent rural counties. By adopting home rule, voters demonstrated their preference that needed new taxes come from sales taxes, paid partially by shoppers from out of town, rather than new utility taxes which would be imposed solely on local residents. Local sales taxes are also popular in communities which have large state universities, such as Carbondale and DeKalb, for it gives the community the ability to place a tax on the purchases of the university students.

41. Taxes on the sale of restaurant food and beverages are popular in large, down-state cities such as Rockford, Peoria, and Rock Island for they enable the city to tax persons from out of town who come to the city on business.



first introduced the municipal tax on the rental of such rooms in Illinois<sup>42</sup> and communities with high volume, regional automobile dealerships pioneered the local tax on the sale of new automobiles.<sup>43</sup>

It was this same tendency to tailor local sales taxes so that they would transfer as much tax burden as possible to non-residents, and simultaneously avoid placing local businesses at a competitive disadvantage, that has led to wide variations between communities in the base upon which sales taxes are levied. The state sales tax is, in reality, a retail occupation tax. It is a broad-based tax on the occupation of retail sales in the state. When it was passed, the state authorized cities and counties to levy an additional retail occupation tax on the same tax base. Virtually all cities and counties have done so. Later, the state exempted retail sales of food and drugs from the state tax, but not from the local portion of the tax. Despite this difference in tax base, the state collects both state and local portions of the tax, remitting the local portion to the appropriate local government.

Because of the prohibition against levying occupation taxes without legislative authorization, home rule governments do not have the power to increase the rate of the retail occupation (sales) tax which they levy in conjunction with the state tax. However, such governments do have the power to levy a tax on sales of commodities, and an increasing number (currently 17) of home rule governments are doing so. In designing their sales taxes, however, these governments are each developing their own idiosyncratic definitions of the kinds of sales which are subject to tax. Variations exist in the coverage of food and beverages, agricultural equipment, industrial equipment, restaurant food and beverages, and the amount of the sale that is taxed.<sup>44</sup> Some communities, for example, tax only the first \$500 of the value of any sale; other communities exempt sales above a stated amount, such as \$5,000, from the tax.<sup>45</sup>

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42. Such taxes were first introduced by Rosemont which is located next to O'Hare Airport and has several thousand persons staying each night in local hotel rooms. The hotel/motel tax is the most frequently used home rule tax. After seeing its popularity, the General Assembly authorized non-home rule governments to levy a hotel/motel tax, but such cities may spend the proceeds of such taxes only to promote local tourism.

43. Arlington Heights, which is home to several large, high volume auto dealerships, was one of the first to introduce this tax.

44. See appendices E and F in *Revenue Review Committee Proposals to Reform the Illinois Tax System*, A Report Submitted to Governor James R. Thompson, April 1987.

45. *Id.* at Appendix C.



Two problems have emerged from this proliferation of local sales taxes in the state. First, although the Illinois Department of Revenue is authorized to collect these taxes and remit the proceeds to the levying community, it has refused to do so because of the local variations in tax base. Thus each local government must establish its own system for the administration and collection of these taxes. Second, such local sales taxes, when added to the state and local retail occupation taxes, produce variations in applicable sales tax rates throughout the state. The Governor's Revenue Review Committee has recently labeled this system "unnecessarily burdensome" and argued that it "causes retailers with multiple locations throughout the state to have particular difficulties."<sup>46</sup> As a result, the Committee has recommended that home rule authority to levy sales taxes be replaced by state authorization which would allow home rule governments the authority to increase the percentage which they could levy as part of the local government portion of the state's retail occupation tax.<sup>47</sup>

Home rule communities, however, are resisting this proposal. On its surface, the proposal offers financial benefits: the state, under this system, would handle all tax administration and collection. Home rule units, however, see themselves losing in two ways: (1) they would lose the option to tailor their sales tax base to local economic circumstances; and (2) more seriously, from their point of view, they would lose home rule tax autonomy in return for taxing authority which would be controlled by the state. They see the proposal as an attempt to erode their home rule powers.

The proposal offers an example of the classic confrontation posed by home rule: the interest of the state, which is concerned with the state-wide business climate, is set against the interest of local communities, which want the autonomy to tailor their taxing systems to their local economic needs. The state sees the confrontation in terms of state-wide interest; local communities see the confrontation in terms of both local interest and the preservation of the integrity of the home rule system.

From an analytic perspective, a further issue is posed by the proposal: to what extent should broad-based local government enabling authority empower local governments to advance their local interests at the expense of the broader state-wide interests? Placed in a different perspective, it poses the issue of whether the state as a whole is better served by stronger local communities, even at some

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46. *Id.* at Recommendation #2.

47. *Id.*



cost in terms of state-wide uniformity, or is better served by state-wide uniformity when such uniformity must be achieved at the expense of weakened local governments.

It is important to note, in this regard, that neither state nor business interests have publicly contended that home rule units, in exercising their sales tax authority, have acted in a fiscally irresponsible fashion or misused their authority. At issue is simply a question of state-wide interest as opposed to local interest in the construction of the taxing system. Ultimately at issue is whether a legislative response, asserting the state's interest, is justified as a means of responding to legitimate, individual home rule community uses of home rule taxing powers.

#### D. THE JUDICIAL RESPONSE

Contrary to the framers' expectations, the courts have played a more active role than the legislature in reviewing, defining and limiting home rule powers, including home rule taxing powers. The judicial response to home rule has varied: lower courts have generally fallen back on traditional, narrow construction of municipal powers when dealing with home rule issues,<sup>48</sup> but the Illinois Supreme Court has been generally responsive to the philosophy and intent of home rule. It has even, on occasion, cited the constitutional directive that home rule powers be liberally construed.<sup>49</sup>

Thus, it is the courts which have been most involved in developing the record of state reaction to the home rule concept regarding local government enabling acts and, in particular, to the taxing powers which have been a part of those enabling acts. Therefore, the courts' reactions to those taxing powers deserve particular scrutiny.

#### IV. THE COURT AND HOME RULE POWERS

Perhaps the most important signal of the Illinois Supreme Court's reaction to home rule came in two early rulings which, more than any others, gave legal acknowledgement to the intent of the Constitution's framers. These were cases in which the court declined the opportunity to impose what would have been broad and unspecified statutory limitations on the exercise of home rule powers.

The first case dealt with the question of whether statutory restrictions on the exercise of municipal or county powers, enacted prior

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48. BANOVETZ AND KELTY, *supra* note 19, at 14.

49. *See, e.g.,* Paper Supply Co. v. City of Chicago, 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

to the 1971 effective date of the 1970 Constitution, should be interpreted as state preemptions of home rule powers. In *Kanellos v. Cook County*,<sup>50</sup> the supreme court considered whether a statute passed prior to 1970, requiring counties to hold a referendum before the issuance of general obligation bonds, was applicable to Cook County. The court held that while the General Assembly had the power to impose a referendum requirement on home rule counties, its action prior to the adoption of the constitution had not complied with the constitution's three-fifths majority vote required to do so.<sup>51</sup> In a similar case, *Sommer v. Village of Glenview*,<sup>52</sup> the court also held that legislation in effect prior to the 1970 Constitution did not limit home rule powers, for it violated the new constitution's home rule provisions by imposing a legislative check on home rule powers without complying with constitutional requirements.

A year after *Kanellos*, the court amplified the principle of that case when it asserted that statutes restricting the exercise of local government powers did not apply to home rule units unless the statute explicitly indicated such a legislative intent.<sup>53</sup>

Through these cases, the Illinois Supreme Court effectively ruled that the general body of statutory law restricting the powers of local government did not automatically apply to home rule units; rather, both a specific statement of legislative intent to achieve that purpose and the applicable provisions of Article VII relating to legislative preemption had to be met before home rule powers were circumscribed by statute.

#### A. THE POWER TO TAX

The courts have generally upheld the legitimacy of the uses which have been made of home rule taxing powers. The Illinois Supreme Court upheld home rule taxes on the retail sale of liquor despite the state's extensive taxation and regulation of the liquor industry (which demonstrated that even though the matter was of statewide interest, it was nevertheless related to local government and affairs within the meaning of the constitution's home rule powers grant).<sup>54</sup>

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50. 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

51. *Id.* at 165, 290 N.E.2d at 243.

52. 79 Ill. 2d 383, 403 N.E.2d 258 (1980).

53. *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) (the issue at bar concerned restrictions on municipal wheel taxes which passed both houses of the General Assembly by more than a three-fifths vote after the effective date of the 1970 Constitution).

54. *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975), *cert. denied*, 425 U.S. 916 (1976).



The courts have also ruled that home rule governments may impose taxes on amusements<sup>55</sup> and the sale of cigarettes,<sup>56</sup> on the grounds that the incidence of such sales taxes is imposed upon the purchaser and not upon the occupation of the sales agent. They have held that home rule ordinances levying wheelage taxes on bases other than those set forth in state law did not represent a licensing for revenue and did constitute a valid classification leading to a reasonable system of taxation.<sup>57</sup> The courts have also held that taxes on the rental of hotel or motel rooms were taxes upon the use of tangible personal property<sup>58</sup> and a privilege tax,<sup>59</sup> rather than a tax upon occupations. They also approved the simultaneous levy of a tax by a home rule county and a home rule city upon the same sales transaction.<sup>60</sup>

Not all court actions, however, have favored home rule; the courts have made it clear there are limits beyond which they will not go. For instance, the action of a home rule county imposing a higher court filing fee to support the county law library was not approved.<sup>61</sup> The court held that the constitution did not authorize home rule units to legislate for the judicial system or impose a fee upon access to the courts.<sup>62</sup> In another instance, the Illinois Supreme Court refused to permit a home rule municipality to levy a tax on a special service district, even though such action was authorized by the constitution, until the legislature had acted to provide the procedures to be followed in exercising such powers.<sup>63</sup>

In the recent case of *People ex rel. Bernardi v. City of Highland Park*<sup>64</sup> the court, in holding that the home rule powers of Illinois municipalities do not extend to the area of prevailing wages for local construction projects, stated in part that the "limited grant of power to home rule units in Section 6(a) legitimizes only those assertions of authority that address problems faced by the regulating home rule

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55. Board of Ed. of School Dist. No. 150 v. City of Peoria, 76 Ill. 2d 469, 394 N.E.2d 399 (1979).

56. S. Bloom, Inc. v. Korshak, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

57. Rozner v. Korshak, 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

58. Springfield Hotel-Motel Assoc. v. City of Springfield, 119 Ill. App. 3d 753, 457 N.E.2d 1017 (1983).

59. Marcus Corp. v. Village of South Holland, 120 Ill. App. 3d 300, 458 N.E.2d 112 (1983).

60. City of Evanston v. County of Cook, 53 Ill. 2d 312, 291 N.E.2d 823 (1972).

61. Ampersand, Inc. v. Finley, 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

62. *Id.* at 542-542, 338 N.E.2d at 18-19.

63. Oak Park Federal Savings and Loan v. Village of Oak Park, 54 Ill. 2d 200, 296 N.E.2d 344 (1973).

64. 121 Ill. 2d 1 (1988).

unit, not those faced by the State or Federal governments.’’<sup>65</sup> Thus, the court imposed further restrictions on the scope of home rule power, and in so doing, reached its conclusions without relying upon the liberal interpretation mandate of the constitution<sup>66</sup> and without attempting to distinguish *Kanellos*.

#### B. TAXES ON INCOME, EARNINGS AND OCCUPATIONS

It is taxes on income, earnings, and occupations which have generated the most controversy. This was evident within the Sixth Constitutional Convention itself. Some delegates argued that home rule governments needed such tax authority to gain access to the revenues that would be needed to accomplish home rule powers.<sup>67</sup> Other delegates, including some home rule supporters, countered with three arguments: (1) local variations in the use of such taxes “could impair the efficient operations [of business] within the state’’;<sup>68</sup> (2) limits on such powers were necessary in order to gain public support for the new constitution;<sup>69</sup> and (3) occupation taxes had been used in another state (Colorado) as a device to circumvent state limits on local use of income taxes.<sup>70</sup>

A majority of the convention’s delegates adopted the restriction against “taxes upon or measured by income or earnings or upon occupations’’ because they feared that home rule practice in this area without legislative control might well lead to a profusion of local income taxes and a burden on business. They were also convinced that the home rule powers provided sufficient taxing powers to achieve home rule goals without the use of these taxes, and they feared that, without such limitations, voters would refuse to ratify the new constitution.

#### C. THE OCCUPATION TAX

From the first year of ratification of the new constitution, the most controversial home rule issue in the Illinois courts has been the nature of the taxes falling within the definition of an “occupation

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65. *Id.* at 12.

66. ILL. CONST. art. VII, § 6(m).

67. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, Vol. IV, 3366 (1972).

68. *Id.* at 3151.

69. *Id.* at 3162.

70. *Id.* at 3157. The Colorado case in which the matter was litigated was *City and County of Denver v. Duffy Storage and Moving Co.*, 168 Colo. 91, 450 P.2d 339 (1969).



tax'' and thus subject to the limitations of legislative authorization. Initially, the courts employed a narrow definition of occupation tax. They approved, for instance, taxes on the sale of cigarettes and amusement tickets.<sup>71</sup>

The landmark ruling came in 1974 in a test of the City of Chicago's Employer's Expense Tax, a tax imposed on employers at the rate of three dollars per employee per month. In *Paper Supply Co. v. City of Chicago*,<sup>72</sup> the Illinois Supreme Court upheld the tax, rejecting the argument that the tax was an occupation tax. In its decision, the court reasoned that if it broadened the definition of an occupation tax beyond that used under the 1870 constitution,<sup>73</sup> home rule sources of revenue would be narrowed, and such narrowing would be in direct conflict with the delegates' intent that home rule units should have broad powers.<sup>74</sup> The court concluded that, in the event some harm arises from its interpretation, the legislature was authorized to correct the situation by a three-fifths vote of both houses.<sup>75</sup> The court, in essence, ruled that courts must consider three conditions when ruling on whether an ordinance created an unconstitutional occupation tax: (1) the courts must construe home rule powers liberally; (2) the tax must be upon a specific occupation to be an occupation tax; and (3) the ordinance in question must place the legal incidence for the tax on the consumer rather than the seller in order to avoid being categorized as an occupation tax.<sup>76</sup>

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71. See *supra* notes 55 and 56 for case references.

72. 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

73. See *id.*

[A]n occupation tax has one of two missions: either to regulate and control a given business or occupation, or to impose a tax for the privilege of exercising, undertaking or operating a given occupation, trade or profession. Its effect is to license a person engaged in a given calling or occupation. A license in form may not be issued to a taxpayer but the payment of the tax is the license under the authority of the State to engage in such occupation. Regulation is not a necessary adjunct of an occupation tax. It may or it may not be. The payment of the tax itself is a condition precedent to the privilege of carrying on a business or occupation. The payment of the tax is made mandatory by the act creating it upon the right of the individual to follow the given occupation. An occupation tax may be levied under the general police powers of the State, where its purpose is to regulate or control a given occupation, or it may be levied under the general sovereign powers of the State, where its sole purpose is to raise revenue.

*Id.* at 566 quoting *Reif v. Barrett*, 355 Ill. 104, 108, 188 N.E. 889, 892 (1933).

74. *Paper Supply*, 57 Ill. 2d at 570, 317 N.E.2d at 12.

75. *Id.* at 571, 317 N.E.2d at 12.

76. *Paper Supply Co.*, 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

This reasoning was changed and the definition of an occupation tax was broadened appreciably in 1982 when a subsequent Chicago ordinance levying a tax upon the sale of services was challenged. In *Commercial Nat'l Bank of Chicago v. City of Chicago*,<sup>77</sup> the court broadened the definition of an occupation tax, stating that "[t]he word 'occupation' in this case must be considered in the broader context . . . and the tax must be judged by the standard of whether it is one imposed upon the privilege of engaging in the business of selling services, that is, in service occupations."<sup>78</sup> The court also held that, if an ordinance imposes a service or occupation tax and is thus unconstitutional, it is not necessary to consider where the legal incidence of the tax is placed.<sup>79</sup>

The immediate consequence of the *Commercial Nat'l Bank* case for home rule units was severe. Not only did the ruling invalidate the Chicago services tax, it also reversed the *Paper Supply* finding on the Chicago Employer's Expense Tax.<sup>80</sup> More severe for home rule, the court immediately used the rationale of that ruling in another case, *Waukegan Community School Dist. No. 60 v. City of Waukegan*,<sup>81</sup> in which it held that municipal taxes imposed on consumers' use of telephone, electricity and gas were unconstitutional taxes on the sale of services.<sup>82</sup> Noting that these municipal taxes were levied on consumers, the court found that they were substantially similar to the municipal utility occupation tax ordinances authorized by the Illinois Municipal Code.<sup>83</sup> Thus, the court concluded that these were invalid and impermissible occupations taxes.<sup>84</sup> In so ruling, the court foreclosed one of the more productive taxes that had been developed through home rule powers.

Thus, while the courts had started a pattern of interpretations of the scope of the term "occupations tax" which had been narrow, and thus favorable to home rule, it reversed direction in the *Commercial Nat'l Bank* case and moved to a much broader, and thus more restrictive, definition of the term, leaving in its wake a more narrow range of potential taxing authority for home rule governments.

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77. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

78. *Id.* at 62, 432 N.E.2d at 235.

79. *Id.* at 79, 432 N.E.2d at 243.

80. *Id.* at 59-62, 432 N.E.2d at 233-35.

81. 95 Ill. 2d 244, 447 N.E.2d 345 (1983).

82. *Id.* at 255, 447 N.E.2d at 350.

83. ILL. REV. STAT. ch. 24, para. 8-11-2 (1981).

84. 95 Ill. 2d 244, 255, 447 N.E.2d 345, 350 (1983).



## V. IMPLICATIONS FOR HOME RULE ENABLING AUTHORITY

From two different perspectives, home rule in Illinois has been a success.<sup>85</sup> First, it has been successful because it has produced a flow of creative new ideas for making local government more effective. The introduction of the hotel/motel tax is one such idea; the development of the real estate transfer tax, now being used by an increasing number of suburban communities in the Chicago area, is another innovative source for local revenues developed through the application of home rule powers. Outside of taxation, the innovations attributable to home rule are even more numerous. Home rule has been used, for example, to develop innovative approaches to resolving problems involving neighborhood racial integration (Oak Park), maintenance of residential properties (Park Ridge), elimination of neighborhood blight (Berwyn), improvement of landlord-tenant relations (DeKalb), promotion of more extensive intergovernmental cooperation in regional economic development (Normal), control of juvenile vandalism (Deerfield), facilitate the demolition of unsafe buildings (East St. Louis), and expedite the sale of industrial revenue bonds (Sauget).

Second, home rule has been successful in the sense that it has not produced failures. Instances of possible abuse of home rule powers are few, and the courts, the General Assembly, and the referenda process have proven effective in placing boundaries around the use of home rule powers. Seventeen years after its adoption, home rule governments continue to function, evaluations of home rule have been positive,<sup>86</sup> and voters in municipalities which have used home rule have voted by an overall 3-2 margin to retain home rule. In general, as an enabling act for the development of local government powers, the approach taken in the home rule provisions of the 1970 Illinois Constitution would appear to be successful.

In the area of taxation, however, it is harder to reach that conclusion. It is in the area of taxation that the principal constitutional restraint on home rule powers was specified — the limitation on the power to tax income, earnings or occupations. It is also in this area that voters are most reluctant to trust the judgment of their local officials, as evidenced by the results of home rule referenda throughout the state. In addition, it is in this area that the courts have interjected themselves to place the most severe constraints on the use of home rule power.

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85. See BANOVELTZ AND KELTY, *supra* note 19.

86. See THE 1980 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES, *supra* note 26; BANOVELTZ AND KELTY, *supra* note 19, at 24-31.



To be sure, the judicial record to date is largely supportive of home rule, even in the area of taxation. The court ruling in *Paper Supply* set forth clear guidelines for deciding the difficult "occupations tax" issue, and set forth guidelines which gave full recognition to the constitutional framers' mandate to construe home rule grants of authority liberally. If the record had been left at *Paper Supply*, home rule would indeed have been well served. But the record was not left there; *Paper Supply* was reversed by *Commercial Nat'l Bank* and the new trend was further aggravated by *Waukegan Community School Dist.* As a result, the residual pool of home rule taxing power was severely curtailed.

Interestingly, the limitation on occupation taxes was imposed partially to prevent the use of the income tax and partially to avoid irregular patterns of taxation in different communities across the state, which would impose a hardship on business.<sup>87</sup> Ironically, neither of the taxes rejected in the *Commercial Nat'l Bank* and the *Waukegan Community School Dist.* cases involved those difficulties.

What prompted the court's action, rather, was the Chicago Services Tax, which imposed a sales tax on the sale of services by such business and professional persons as lawyers, doctors, accountants, barbers, and repair services. The Home Rule Attorneys group of the Illinois Municipal League had opposed the enactment of the tax, fearing that the tax, linked closely as it was to occupations, would pose an excessive risk of adverse court action and offset the favorable pattern of rulings that had developed in the wake of *Paper Supply*. Regardless of this concern, the City of Chicago imposed the tax, and the Home Rule Attorney's worst fears were realized with the ruling in *Commercial Nat'l Bank*.

Equally ironically, the constitution's authors did not oppose home rule authority to levy sales taxes on the grounds that variations among communities in that tax would impose a hardship for business. Yet, that is precisely the basis behind the suggestion of the Governor's Revenue Review Committee's proposal that home rule sales tax authority be curtailed in favor of broader legislative authorization to levy a local retail occupation tax. Given the consequences of the court action narrowing home rule tax authority, it is not surprising that municipal officials have reacted negatively to a proposal that would involve legislative action which would have the same effect.

Thus, the grant of authority given to home rule units to levy taxes is under siege. Threats to home rule tax powers are more than

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87. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, Vol. IV, 3151 (1972).



just threats to that authority; they are threats to the very essence of home rule itself. As participants to the Sixth Constitutional Convention correctly noted, home rule powers to address community issues are hollow without corollary powers to raise the revenues needed to implement such powers.<sup>88</sup>

Even the constitutional convention delegates who voted to impose the limitations on the power to tax income, earnings and occupations understood this linkage between tax power and the other home rule powers. The founders, however, believed that they had given home rule units adequate taxing power, particularly in light of their liberal construction mandate. That mandate was integral to the court's action in *Paper Supply*, but it was ignored in *Commercial Nat'l Bank* and again, more recently, in *Bernardi*.

The ultimate irony is that these narrowings of home rule authority stem less from abuses of home rule powers, which legislative and judicial review were designed to prevent, and more from concern over taxpayer convenience. To be sure, the Chicago Services Tax might have constituted an inappropriate use of home rule taxing power, but the remedy in that case did not require reversal of the findings in *Paper Supply*, nor did it subsequently merit the court's findings in *Waukegan Community School Dist.*

The court could have found against the Chicago Services Tax without necessarily overlooking the constitutional mandate that home rule powers be liberally construed. It need not have overruled *Paper Supply*, in holding that the Chicago Services Tax fell within the definition of an occupation tax, by defining the occupation tax as broadly as it did. By broadening that definition, however, it severely limited the range of home rule taxing authority and, in so doing, undermined the utility, if not the functional capability, of the broad based enabling principle inherent in the Illinois home rule experiment.

## VI. SUMMARY

What the courts have accomplished is a demonstration of the weakness of the principle that local governments can function effectively with broadly defined powers. That weakness is not, as so many have feared, the inability of local governments to use such powers responsibly.

Illinois' home rule cities and villages have demonstrated that narrow, limited grants of power are not needed to enforce responsible local government behavior. The behavior of home rule cities and

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88. *Id.* at 3366.

villages has been responsible, not because of a lack of power, but because local policy-makers are restrained by the ultimate check in a democracy: the will of the people as reflected through the political process. Even with their broad grants of powers, Illinois cities and villages have used their authority in a "restrained" manner.<sup>89</sup> The reaction of the voters to home rule in those communities which have exercised home rule powers is perhaps the best evidence that home rule has, indeed, worked satisfactorily.

Yet, home rule—the use of broad grants of local enabling authority—cannot work unless it is given the latitude which the framers of the 1970 Illinois Constitution underscored in their liberal construction mandate. The courts and the legislature must be as careful in protecting the well-being of the home rule system, and must be as faithful to the liberal construction mandate of the 1970 Constitution, as they are to the needs and conveniences of those who are ultimately served by the qualities which home rule can bring to the local governing process.

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89. THE 1970 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES, *supra* note 26, at 14.



# The Education Article of the 1970 Illinois Constitution: Selected Policy Issues for Consideration and Debate at the Next Constitutional Convention

B. DOUGLAS ANDERSON\*

## I. INTRODUCTION

The Education Article of the Illinois State Constitution, Article X, is one of the briefest in the document. Yet it deals with a subject which is of paramount importance to our society: the development of future generations of citizens—those who will be responsible for our democratic way of life, our culture in all its diversity, and the preservation and evolution of those values which underpin our society. The record of proceedings of the Sixth Illinois Constitutional Convention,<sup>1</sup> the convention of 1969 which drafted the present Constitution, demonstrates that the education of our youth is a topic which engenders caring, concern, and conflict among people who must articulate the principles which will provide the framework for the government of our state. If there is to be a constitutional convention at the end of this decade, then the language articulating the purposes, governance, and financing of public education merits reconsideration. We must be certain those principles reflect what we really mean to say, what we believe and are committed to, for they will shape the new generations not only in and for the complex world we at present vaguely comprehend, but also for the unknown dimensions of the twenty-first century.

The Constitution of 1870 contained its article on public education at Article VIII and contained additional relevant provisions at Articles

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1. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1970 RECORD OF PROCEEDINGS, (1972) [hereinafter RECORD OF PROCEEDINGS].

IV, V, and IX.<sup>2</sup> Article X of the present Constitution has three

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2. ILL. CONST. of 1870 art. VIII:

§ 1. The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.

§ 2. All lands, moneys, or other property, donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made.

§ 3. Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian domination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose.

§ 4. No teacher, state, county, township or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school in this state, with which such officer or teacher may be connected, under such penalties as may be provided by the general assembly.

ILL. CONST. of 1870 art. IV:

§ 22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for . . . Providing for the management of common schools; . . . Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted.

ILL. CONST. of 1870 art. V:

§ 1. The executive department shall consist of a . . . superintendent of public instruction . . . who shall . . . hold his office for the term of four years from the second Monday of January next after his election and until his successor is elected and qualified. They shall . . . reside at the seat of government during their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law.

ILL. CONST. of 1870 art. IX:

§ 3. The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for . . . school . . . purposes, may be exempted from taxation; but such exemption shall be only by general law.

§ 12. No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five percentum on the value of the taxable property therein, to be



sections. Section 1 articulates general principles on the goals and purposes of the state system of public education; the analogous provisions were at Section 1 of Article VIII of 1870. Additionally, the current Section 1 says the state has the primary responsibility for funding public education. Section 2 provides for the election of a State Board of Education with the duty to appoint a chief state educational officer; the prior mechanism was found at Section 1 of Article V of 1870. Formerly the Superintendent of Public Instruction had been elected since an act of 1845; the elective position was terminated at the conclusion of the term of office of the last elected state superintendent on January 1, 1975. Section 3 prohibits the use of public funds for sectarian purposes; the identical provision was at Section 3 of Article VIII of 1870.

At the last constitutional convention, the Education Committee proposed the following changes to Article VIII of the 1870 Constitution:

1. that Section #1 be reworded;
2. that a new Section #2 creating a State Board of Education be inserted and that the Superintendent of Public Instruction be eliminated as an elected office;
3. that section #3, prohibiting the use of public funds for sectarian purposes be retained; and
4. the elimination of Section #2, 3, and 4.<sup>3</sup>

This paper will only briefly touch on Section 2 of Article X, which provides for the election of a State Board of Education and its appointment of the chief state educational officer, or Section 3 of Article X, which repeats the language of the 1870 Constitution prohibiting the use of public funds for sectarian purposes.<sup>4</sup> These are

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ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay and discharge the principal thereof within twenty years from the time of contracting the same.

3. RECORD OF PROCEEDINGS, *supra* note 1, vol. VI at 225.

4. ILL. CONST. art. X, § 2(a):

2.(a) There is created a State Board of Education to be elected or selected on a regional basis. The number of members, their qualifications, terms of office and manner of election or selection shall be provided by law. The board, except as limited by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. The Board shall have such other duties and powers as provided

important topics but beyond the primary scope of this article.

The main question under Section 2 would be whether the system of electing a State Board of Education, rather than appointing the Board, and appointing the Superintendent of Public Instruction, rather than electing that officeholder, has functioned as the delegates expected it to. That would be a lengthy study which merits attention but which is not possible to fully address here.<sup>5</sup>

Section 3 was retained without change partly because delegates felt it would be too controversial to tamper with the language. Obviously the topic of separation of church and state remains at the center of controversy. Witness the recent spate of litigation across the country brought by the religious right and the rise of political activism of such groups, as well as suits brought to challenge alleged funding of sectarian related activities.<sup>6</sup> Some might argue that Section 3 is superfluous in light of the Establishment Clause of the First Amendment, that federal cases applying that language adequately prevent the use of public monies for religious purposes. However, others could argue that the Illinois language is more specific and more restrictive than the First Amendment's prohibition. Undoubtedly, should there be a constitutional convention, debate on the church-state issue will engender intense feelings. An adequate treatment of

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by law.

ILL. CONST. art. X, § 3:

3. Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose.

5. It is interesting to note that at the time of the 1969-70 convention election of state school boards was definitely the minority position; thirty-five states had boards appointed by the governor and seventeen had boards elected by the people or representatives of the people. U.S. OFFICE OF EDUCATION, STATE BOARDS OF EDUCATION 60-61 (1974), *cited in* W. VALENTE, *LAW IN THE SCHOOLS*, (2d ed. 1987).

6. Articles and law suits readily attest to the continuation of widespread disputation. *See, e.g.*, *Mozart v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987); *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). *See also generally*, *Lawsuit Challenges Chapter 1 and 2 Aid to Church Schools*, VII Education Week 14, (Dec. 19, 1987); *Prayer at Sports Events is Challenged*, VII Education Week 13, (Dec. 2, 1987); *Americans United Moves to Stop Iowa Tax Break for Parents*, 15 School Law News 22, (Oct. 29, 1987); and the list could continue for pages.



the issues would require a lengthy treatise and is also beyond the scope of this article.

## II. POLICY LANGUAGE OF SECTION ONE

This essay will devote its attention to Section 1, for statements of purpose and policy are often those most subject to ambiguity (deliberate or otherwise), to potential misinterpretation, and to the continued need for debate on public policy.

Section 1 of Article X provides as follows:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The state shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.<sup>7</sup>

The *Record of Proceedings: Sixth Illinois Constitutional Convention* shows that the Committee on Education wanted to emphasize "that education is the most important function of state and local government."<sup>8</sup> The language submitted by the Committee on Education was different than that finally adopted by the delegates to the convention. The Committee had proposed the following language:

The paramount goal of the people of the State shall be educational development of all persons to the limits of their capacities.

To achieve this goal, it shall be the duty of the State to provide for an efficient system of high quality public education institutions and services.

Education in the public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides.<sup>9</sup>

This was quite a change from the existing language of the 1870 Constitution.<sup>10</sup>

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7. ILL. CONST. art. X, §1.

8. RECORD OF PROCEEDINGS, *supra* note 1, Vol. VI at 231.

9. *Id.* at 227.

10. For the language of the 1870 Constitution, *see supra* note 2.

The Convention debated the merit of making education a "paramount" goal.<sup>11</sup> Delegates questioned whether such a statement indicated a priority of the state and would impose a mandate on the Executive branch and the General Assembly to provide for education, perhaps at the expense of everything else. Testimony indicated it was the intention of the Committee to give a mandate to carry out this goal.<sup>12</sup> Although the delegates debated such niceties as whether education was to be "*a* paramount goal" or "*the* paramount goal," neither phrase was adopted. The Committee's language was rejected and education became merely "a fundamental goal" of the state.

One can speculate that had education been labeled a paramount goal, which as noted in the constitution debates means "first" or "foremost," perhaps litigation requiring its funding, or requiring budget cuts in other areas before cutting public education, would have ensued.<sup>13</sup> As enacted, though, Section 1, which provides that a fundamental goal of the state is the educational development of all persons to the limits of their capacities, has been held by the courts to be a statement of general philosophy rather than a mandate that certain means be provided in any specific form.<sup>14</sup> Thus, this portion of the Illinois Constitution appears to be interpreted as being an expression of general philosophical aspiration, not as creating any duty on the government. However, as will be suggested *infra*, perhaps this language needs to be discussed again in light of other legal developments.

The Committee found Section 1 of Article VIII of the 1870 Constitution faulty because some terms used were imprecise in meaning, e.g., "children," "good," and "common school."<sup>15</sup> The Committee noted that the terms had been frequently tested in court due to their ambiguity and cited Braden and Cohn's *The Illinois Constitution: An Annotated and Comparative Analysis* as evidence of such.<sup>16</sup>

The current provision avoids the problem of having the courts define "children" or "common schools," but it opens the door for litigation to clarify "persons" and "to the limits of their capacities."

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11. RECORD OF PROCEEDINGS, *supra* note 1, Vol. II at 762-802.

12. *Id.* at 766.

13. This is not the same issue as requiring the state to be primarily responsible for funding public education, which will be discussed *infra*.

14. O'Connor v. Bd. of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981).

15. RECORD OF PROCEEDINGS, *supra* note 1, vol. VI at 232.

16. *Id.* at 232, *citing* G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* (1969).



“Persons” obviously includes adults—not just individuals over the age of eighteen, but also, for example, those over the age of twenty-one and over the age of forty. Could an adult who has not completed public schooling lay claim to a right to attend public secondary schools in order to complete his or her education? The constitutional right to an education “to the limits of one’s capacity” raises not simply technical questions of assessment but also complex questions of policy in the area of special education.

### III. “TO THE LIMITS OF THEIR CAPACITIES”

Intentionally or not, the Committee anticipated a development in the area of special education, and the language of Section 1 opens the door for policy and legal debate which remain to be resolved. The question is: “To what extent are handicapped persons entitled to educational services and what are the applicable standards for educational services?” Prior to 1970, the Illinois courts had held that state schools for the mentally incompetent were charitable and hospitable institutions and were not part of the common school system, and thus there was no obligation to provide free school training for the mentally incompetent.<sup>17</sup> The Committee stated specifically that it was seeking to expand the scope of coverage to include the handicapped:

[T]he objective that all persons be educated to the limits of their capacities would require expansion beyond the traditional public school programs. It recognizes the need of the person with a physical handicap or mental deficiency who nevertheless is educable. Adults, too, may profit from further formal education. The objective is to provide each person an opportunity to progress to the limit of his ability.<sup>18</sup>

In order to provide education to handicapped children, Congress enacted the Education of All Handicapped Children Act (EHA), still often referred to as Public Law 94-0142.<sup>19</sup> The EHA requires states and local educational agencies (*i.e.*, school districts) which receive

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17. *Dept. of Pub. Welfare v. Haas*, 15 Ill. 2d 204, 154 N.E.2d 265 (1958).

18. *RECORD OF PROCEEDINGS*, *supra* note 1, Vol. VI at 234. Adults would appear to be entitled to education through the secondary level under the literal terms of Sec. 1 and according to the Committee’s recommendation. Arguably, new residents from foreign shores, migrants, functional illiterates, drop-outs, or any adult with less than a high school diploma could enjoy, not the mere privilege of night classes, but the right to a free secondary-level public education.

19. 20 U.S.C. § 1401 *et. seq.* (1976).

federal monies to provide a free appropriate public education to every identified handicapped child.<sup>20</sup> The potential interrelationship of this federal law and Section 1 of Article X of the Illinois Constitution merits consideration.<sup>21</sup>

In *Pierce v. Board of Education*,<sup>22</sup> Section 1 was found not to impose a duty on boards of education to place students in special education classes since the article was not self-executing.<sup>23</sup> However, in addition to the federal requirements under the EHA, Illinois has state legislation providing for special education.<sup>24</sup> Thus, there are federal and state statutes which execute the provision and give bases for implementing a duty to provide special education.

Special education litigation raises the reoccurring question: "What is the free education to which one is entitled?" The open question for special education under Section 1 is whether the phrase, "to the limits of their capacities" imposes an actual standard for public educational institutions to meet or whether it is merely a "philosophical" statement.

The EHA requires for each handicapped child the development of an "individualized education program" (IEP).<sup>25</sup> The IEP sets forth the instructional goals and objectives as well as the educational and related services which will constitute the "free appropriate public education."<sup>26</sup> In litigation under the EHA, there is frequently a dispute between the parents of a handicapped child and the educational agency as to whether an appropriate educational plan is being offered. Generally the parents are seeking the best possible educational services for their child, perhaps a high-cost residential placement, while the school district is proposing a plan with more modest components which it argues is, nonetheless, an "appropriate" education. For example, a school district may offer instruction in a self-contained class in an elementary school with support services while the parents may desire placement in a private residential facility. According to the Supreme Court in *Board of Education of Hendrick Hudson v.*

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20. 20 U.S.C. § 1412(1) (1976).

21. A nice treatment of the background to the EHA and its purposes is found in Miller and Miller, *The Education for All Handicapped Act: How Well Does It Accomplish Its Goal Of Promoting The Least Restrictive Environment For Education*, 28 DEPAUL L. REV. 321 (1979).

22. 69 Ill. 2d 89, 370 N.E.2d 535 (1977).

23. *Id.* at 92, 370 N.E.2d at 536.

24. State special education statutes are found at ILL. REV. STAT. ch. 122, para. 14-1.01 *et seq.* (1985).

25. 20 U.S.C. §§ 1401(9), 1414(2), (5) (1982).

26. 20 U.S.C. § 1401(18),(19) (1982).



*Rowley*,<sup>27</sup> Congress intended the EHA to create a basic floor of educational opportunity for disabled children but did not require the child be provided the best possible education:

In explaining the need for federal legislation, the House Report noted that 'no congressional legislation has required a precise guarantee for handicapped children, *i.e.*, a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children.' [Cite omitted.]. . . Assuming that the Act was designed to fill the need identified in the House Report - that is, to provide a 'basic floor of opportunity' consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of 'equality,' cannot be read as imposing any particular substantive educational standard upon the States.

[Thus the lower courts] . . . erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children.<sup>28</sup>

#### IV. A HIGHER STANDARD

The interesting question is whether Illinois has imposed upon itself a duty to provide a higher level of services (more than a basic floor of opportunity) by virtue of the constitutional provision which sets forth as a goal "the educational development of all persons to the limits of their capacities."<sup>29</sup>

A "free appropriate public education" is defined in the EHA in relevant part:

The term "appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State education agency, . . .<sup>30</sup>

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27. *Bd. of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176 (1982).

28. *Id.* at 200.

29. ILL. CONST. art. X, §1.

30. 20 U.S.C. § 1401 (1982).

One could argue that Section 1 of Article X establishes the standard for education as the limits of a child's capacities. The Court in *Rowley* found that the EHA did not establish a standard of maximizing the potential of each handicapped child.<sup>31</sup> However, the holding does not preclude a state from imposing a higher standard on itself.

In *David D. v. Dartmouth School Committee*<sup>32</sup> the federal appellate court held that state standards requiring special education programs to assure maximum possible development would be incorporated into the federal EHA. Specifically the court accepted the district court's reasoning that:

[S]ince Massachusetts law mandated a level of substantive benefits superior to that of the federal Act [EHA], the state standard would be utilized as determinative of what was an 'appropriate' education for the child.<sup>33</sup>

In Illinois, the two-stage argument would be: first, that Section 1 of Article X sets the standard for educational services to be provided; and second, such a higher standard is enforceable under the federal EHA. It does not appear that this specific argument has been addressed by the state or federal courts in Illinois.

The United States District Court for the Northern District of Illinois has considered the "free education" provision of Article X as applied to the handicapped child under the EHA, but was not presented with the "limits of their capacities" question.<sup>34</sup> In a subsequent case involving the same parties, the court found that the state regulations enacted pursuant to the EHA do not confer greater rights for a particular type of service than those mandated directly by the EHA.<sup>35</sup> However, the court was presented only the question of the state regulations as drafted; it was not presented the issue of whether Article X of the Illinois Constitution itself imposes a higher standard than that of the EHA.<sup>36</sup> Subsequent litigation between the parties dealt with reimbursement for services unilaterally incurred by the

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31. *Rowley*, 458 U.S. 176, 200 (1982).

32. 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

33. *Id.* at 423.

34. *See* *Max M. v. Thompson* 566 F.Supp. 1330 (N.D. Ill. 1983). The Illinois state courts had previously decided that sec. 2 of art. X requires that the special education programs established by the legislature be free of tuition through the secondary level. *Elliot v. Bd. of Educ. of Chicago*, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978).

35. *Max M.*, 592 F. Supp. 1437 (N.D. Ill. 1984).

36. To a great extent the state regulations merely mirror the federal requirements and impose no higher standards or obligations.



parent under the *Burlington School Committee v. Dept. of Education*<sup>37</sup> doctrine, but the issue of a state constitutional standard for services was not addressed.<sup>38</sup>

#### V. "MERE PHILOSOPHY" OR AN ENFORCEABLE PRINCIPLE

Although *O'Connor v. Board of Education of School District No. 23*<sup>39</sup> is cited for the proposition that Section 1 of Article X, providing that a fundamental goal of the state is the educational development of all persons to the limits of their capacity, is a statement of general philosophy rather than a mandate, the case was actually a school athletics sex discrimination case and was citing to *Pierce v. Board of Education of the City of Chicago*<sup>40</sup> for authority.<sup>41</sup> However, *Pierce* was a 1977 special education case which was not decided under the EHA, in which the court held that Article X, Section 1 is not "self-executing."<sup>42</sup> Its articulation that Section 1 is only a statement of general philosophy is, at best, dictum. *Pierce*, in turn relied upon *Sullivan v. Midlothian Park Dist.*,<sup>43</sup> which had absolutely nothing to do with any constitutional provisions pertaining to public education. *Sullivan* was a public immunity and liability insurance case, and contains no opinion on any Education Article of

37. 471 U.S. 359 (1985). In *Burlington*, the Court found a unilateral change of placement by parents did not constitute a waiver of the parents' right to reimbursement for expenses of private placement. Otherwise parents would be forced to leave their child in what may be an inappropriate educational placement or to obtain appropriate placement only by sacrificing any claim for reimbursement. *Id.* at 372.

38. *Max M.*, 629 F. Supp. 1504 (N.D. Ill. 1986).

39. 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981).

40. 69 Ill. 2d 89, 370 N.E.2d 535 (1977).

41. *O'Connor*, 645 F.2d at 582.

42. *Pierce*, 69 Ill.2d at 92, 370 N.E.2d at 536. The court stated that: The article is not self-executing. Its pronouncement of the laudable goal of "the educational development of all persons to the limits of their capacities" is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form. Similar provisions of both the 1970 Illinois Constitution and its predecessor, the 1870 Constitution, have been so interpreted. (See *Sullivan v. Midlothian Park Dist.* (1972) 51 Ill. 2d 274, 277, 281 N.E.2d 659). Whether the Board had the duty to place the plaintiff in a special education class, therefore, can only be ascertained by examining the applicable statutes and regulations governing the administrations of special education facilities in this State.

*Id.*

43. 51 Ill. 2d 274, 281 N.E.2d 659 (1972).

the Illinois Constitution establishing purposes or standards of education, past or present.<sup>44</sup>

Thus the federal courts in *Pierce* and *O'Connor* misconstrued Illinois law regarding the Education Article. Moreover the question of the "self-execution" of the provision is no longer relevant now that both federal and state statutes impose duties regarding the provision of educational services to handicapped children. Therefore, the "limits of their capacities" as a standard for the provision of services for education development of all citizens remains one which could well be relitigated.

The possibility that Section 1 of Article X imposes a standard for services which may be litigated is being raised for discussion in the context of providing educational services to handicapped children because the EHA provides an administrative and judicial review process for disputes regarding the provision of such services. Thus, there is a ready forum which has been and is frequently used for the protection of the rights of handicapped children. It is conceivable that the "to the limits of their capacities" language could be raised in contexts in addition to special education.

For example, there is attention being paid to the educational needs of "gifted" students.<sup>45</sup> The parents or guardians of educationally gifted children could argue that school districts are failing in their constitutional responsibilities if a sufficiently enriched and stimulating education, at least through the secondary level, is not provided to academically talented children. Finally, what is the appropriate remedy if the state fails to educate one to the limits of one's capacity? Mandatory remediation? Provision of services to adults? Damage actions?

## VI. DO CONSTITUTIONAL DUTIES CREATE NEW TORTS?

This raises a related issue upon which to speculate: whether setting the goal of educational development of all persons to the limits of their capacities opens the door for establishing the as yet unrecognized tort of "educational malpractice." In the seminal case, *Peter W. v. San Francisco Unified School District*,<sup>46</sup> a high school graduate

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44. *Id.* The case addressed remedies for damage in light of immunities. It considered § 19 of art. II and § 22 of art. IV of the Constitution of 1870, and referred to art. VIII, Sec. 12 of the 1818 Constitution and art. XIII, Sec. 12, of the 1848 Constitution, but *not* art. VIII of the 1870 Constitution. *Id.*

45. Witness, for example, the creation of the state Math/Science Academy and the rise of "gifted" education programs.

46. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).



sued the school district from which he graduated on a theory of educational malpractice because his functional educational level was far below that of the twelfth grade. The court refused to recognize educational malpractice as a cause of action, in part, because there was no standard of care owed.<sup>47</sup> Other courts have followed the reasoning of *Peter W.* and have refused to recognize educational malpractice as an actionable claim.<sup>48</sup>

However, a plaintiff's attorney in Illinois might argue not only that the Illinois Constitution establishes a right to an education,<sup>49</sup> but also that Section 1 sets a standard to be attained against which a school district's execution of the duty owed can be measured. On its face such an argument at least merits debate.<sup>50</sup> Complicating the problem in Illinois, and adding additional bricks to buttress an educational malpractice claim, is the fact that educational reform is resulting in express criteria and educational objectives.<sup>51</sup> Schematically, the argument would be that there is a duty to educate grounded in both the state constitution and statutes, and that there are both constitutional standards, *i.e.*, the limit of one's capacity, and standards defined by the State Board of Education. Thus, Illinois may have opened the door to educational malpractice claims, as the policy considerations upon which other states refused to recognize such a claim may have been eliminated by an express articulation of the duty and standard.<sup>52</sup>

It appears, then, that Section 1 of Article X merits reconsideration and debate because the phrase "to the limits of their capacities" may establish a constitutional standard requiring the recognition of edu-

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47. *Id.*

48. *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1982); *Hoffman v. Bd. of Educ. of City of New York*, 49 N.Y.2d 121, 400 N.E.2d 317 (1979); *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352 (1979); *Tubell v. Dade Co. Public Schools*, 419 So.2d 388 (Fla. App. 1982); *Smith v. Alameda Co. Social Serv. Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979).

49. There is, of course, no federal constitutional right to education. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

50. Even courts which have not found a cause of action in educational malpractice have reserved a possible exception for gross violations of defined public policy. See *e.g.*, *Donohue*, 47 N.Y.2d at 445, 391 N.E.2d at 1354.

51. See, for example, the reforms initiated in the Education Reform Package of 1985 as embodied in S.B. 730, H.B. 1070 and 1985 Ill. Laws 1351.

52. This discussion does not raise or consider the complex problem that arises in special education where there may be allegations of malpractice based on misdiagnosis or misplacement. See, *e.g.*, Zirkel, *Educational Malpractice: Cracks in the Door?* 23 EDUC. L. REP. 453 (1986).

cational malpractice claims in Illinois, and also may establish a higher standard for the provision of services to handicapped children to be incorporated and enforced under the federal EHA. It was the stated intent of the framers that this language would necessitate expansion of services beyond the customary school programs.<sup>53</sup> Given such an expansive goal, the courts should be open to creative claims for new and diverse high-quality service:

[T]he language of Section 1 be in harmony with the rising expectations of the people of Illinois for the maximum development of persons of every level of competence, highest to lowest, and be consistent with the expansion of educational experiences that may occur in the decades ahead.<sup>54</sup>

Given the expansive language and noble intent, it is surprising that the provisions have not been subject to more frequent and more vigorous litigation over almost two decades by the handicapped, the gifted, those who feel the school systems have failed to provide adequate education, and adults who lack twelfth-grade academic and vocational skills.<sup>55</sup> Whatever form such claims might take, they all would entail additional expense to the system of public education.

## VII. FINANCING THE GOALS

The financing of any state function tends to be controversial, and the financing of public education has not been immune from debate.<sup>56</sup> The financing of public education was a matter of debate at the Sixth Constitutional Convention which resulted in paragraph 3 of Section 1 of Article X, *viz.*, "The State has the primary responsibility for financing the system of public education."<sup>57</sup>

At the convention, the Education Committee originally introduced language which dealt with the financing of public education in much more specific terms:

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53. "[T]he second paragraph of the proposed revision includes authorization for educational services which are not necessarily school, or institutionally related." RECORD OF PROCEEDINGS, *supra* note 1, vol. VI at 235.

54. *Id.* at 233.

55. "Adults, too, may profit from further formal education. The objective is to provide each person an opportunity to progress to the limit of his ability." *Id.* at 234.

56. The Illinois General State Aid formula was subject to sunset provisions to be effective August 1, 1987, by Public Act 84-126. However, the failure to create a new formula or the means for funding one has resulted in the postponement of such termination 1987 Ill. Legis. Serv. 85-132 (West).

57. ILL. CONST. art. X, §1.



To meet the goals of Section 1, substantially all funds for the operational costs of the free public schools shall be appropriated by the General Assembly for the benefit of the local school districts. No local governmental unit or school district may levy taxes or appropriate funds for the purposes of such educational operation except to the extent of ten percent (10%) of the amount received by that district from the General Assembly in that year.<sup>58</sup>

Re-occurring elements in any policy debate on financing public education include consideration of the burden on local taxpayers, particularly property holders; inequality of resources at local levels, resulting in inequality of education between richer and poor communities; and the balancing of state versus local control, the fear on the local level that if financing is from the state then the state will impose its wishes on the local communities.<sup>59</sup> The majority report of the Education Committee recognized the problem of inequality inherent in local financing:

A salient fact of Illinois school finance is the enormous inequality among the districts with respect to their resources from local tax receipts.<sup>60</sup>

Throughout the 1960's, social critics, educators and economists challenged local property tax financing of public education as being anti-democratic because it made educational opportunity unequally dependent upon the accident of one's place of residence.<sup>61</sup> The Education Committee showed cognizance of these arguments in its report:

Thus, the quality of education received by any student in the State is largely a product of the accident of the wealth of his district. In poorer districts, the citizens must impose a greater tax burden upon themselves in order to achieve the same level of spending as wealthier districts.<sup>62</sup>

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58. The Illinois General State Aid formula was subject to sunset provisions to be effective August 1, 1987, by Public Act 84-126. However, the failure to create a new formula or the means for funding one has resulted in the postponement of such termination. 1987 Ill. Legis. Serv. 85-132 (West).

59. RECORD OF PROCEEDINGS, *supra* note 1, Vol. VI at 295.

60. *Id.* at 296-97.

61. For a scholarly discussion of the impact of variation in wealth upon the education available, in the same time period of the Sixth Constitutional Convention, See generally J. COONS, W. H. CLURE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION, (1970).

62. RECORD OF PROCEEDINGS, *supra* note 1, vol. VI at 297.

The majority of the Education Committee advocated a shift to state-wide financing as the means of relief from property tax escalation.<sup>63</sup> The majority argued its proposed language would address the problem of balancing local control and equality of resources:

In conclusion, the committee is convinced that this proposal maximizes the attainment of two objectives which otherwise seems [*sic.*] to be mutually self-contradictory—the equalization of educational opportunity statewide and the maintenance of local control.<sup>64</sup>

A minority of the Education Committee dissented from the proposal that substantially all funds for the operational cost of the free public schools be appropriated by the General Assembly. The minority favored increased state support for free public schools and acknowledged the inequalities which exist in the resources of local school districts and the burden on property taxpayers but thought it both unnecessary and unwise to include such language in the Constitution.<sup>65</sup> The minority feared that such language would lead to increased state control and would result in a leveling of schools.<sup>66</sup> A limitation on local support to 10% of the appropriations of the General Assembly would decrease educational services in those schools where districts were funding special programs; in short, it might improve inferior schools but would lower education in better schools.<sup>67</sup>

The debate continued and various amendments were proposed.<sup>68</sup> Ultimately, after substantial debate, the language of the majority report was defeated.<sup>69</sup> The constitutional debate embodied all the

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63. "If the State should take over most of the cost of operating the elementary and secondary schools, the tax burden would be shifted to state tax revenues, probably to the income tax." RECORD OF PROCEEDINGS, *supra* note 1, vol. VI at 298.

64. *Id.* at 299.

65. *Id.* at 300.

66. *Id.* at 301-02.

67. *Id.* at 302.

68. See, e.g., the Bottin Amendment, which would have limited funding by local taxation to not exceed 50% of total funding (introduced RECORD OF PROCEEDINGS, *supra* note 1, vol. IV at 3550, defeated RECORD OF PROCEEDINGS, *supra* note 1, vol. IV at 3552) and the Parker Amendment which would have provided that the "General Assembly shall raise and distribute revenue from sources other than *ad valorem* property taxes to the extent of 90 percent of the average total cost of public education as determined by the state board of education." (introduced RECORD OF PROCEEDINGS, *supra* note 1, Vol. IV, at 3547, defeated RECORD OF PROCEEDINGS, *supra* note 1, Vol. IV, at 3550).

69. Mathias' motion to delete said language introduced RECORD OF PROCEEDINGS, *supra* note 1, Vol. IV, at 3553, and adopted RECORD OF PROCEEDINGS, *supra* note 1, Vol. IV, at 3570.



policy considerations which raged at that time and which, arguably, are still before us. Equitable and effective financing of public education remains a matter of deep concern nationwide and merits renewed debate. At this time however, the debate must include additional factors.

In the two decades since the Sixth Constitutional Convention rural property values have plummeted, America's worldwide leadership in education has been challenged and the schools have absorbed even more functions than they had before. Therefore, education as the means to personal and national survival and progress is even more crucial. Also, the courts have expressed themselves on the financing of public education so that the public may need to reconsider how it wishes to articulate its principles regarding financing K-12 education.

In 1971, a decision of the California Supreme Court was hailed by educators nationwide as resolving the issue of the inherent inequality in local financing of education. In *Serrano v. Priest*<sup>70</sup> the state supreme court held that a public school financing system which relied heavily on local property taxes and caused substantial disparities among individual school districts in the amount of revenue available per pupil insidiously discriminated against the poor and violated the equal protection clause of the fourteenth amendment. The right to an education in public schools is a fundamental interest which cannot be conditioned on wealth; discrimination in school financing based on the wealth of the districts because of the fortuitous presence of commercial and industrial establishments is invalid.<sup>71</sup> This decision remains worthwhile reading because of the court's summation of the opposing positions which are still currently debated. Although the decision was greeted as a landmark which would result in nationwide revision of school funding schemes and initiate equal educational opportunity, it had little impact because of a subsequent 1973 United States Supreme Court decision.

In *San Antonio Indep. School Dist. v. Rodriguez*,<sup>72</sup> Mexican-American parents of school children who were poor or resided in school districts having a low property tax base brought suit alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court found sizable differences in the value of assessable property between local school districts and opined that growing disparities in population and taxable property between districts were

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70. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

71. *Id.* at 601, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.

72. 411 U.S. 1 (1973).

responsible in part for increasingly notable differences in levels of expenditure for education.<sup>73</sup> The Court found education is not among the rights afforded explicit protection under the Federal Constitution, that poverty is not a suspect classification, and left the problem of inequities in school finance to the individual states to address.<sup>74</sup>

Once again Illinois needs to debate these positions regarding financing public education and especially to address the deepening inequities between local school districts, which the current school aid formula—whose demise is on hold—has not effectively ameliorated. If there is a 1989-90 constitutional convention, then a provision on this topic must be considered.

The present language in paragraph three of Section 1 of Article X, provides only that, "The State has the primary responsibility for financing the system of public education."<sup>75</sup> At the time of the adoption of this provision the State's contribution to finance public education was approximately 30.74%.<sup>76</sup> Shortly after the adoption of the 1970 Constitution, taxpayers brought an action to declare invalid provisions of the school code pertaining to furnishing state funds to local school district. In *Blase v. State*,<sup>77</sup> the plaintiff's position was that the constitutional phrase, "the primary responsibility for financing," required the state to provide at least 51% of the funds for public education.<sup>78</sup> The opinion of the court indicates that it considered portions of the *Record of Proceedings of the Sixth Illinois Constitutional Convention* to determine the intent of the delegates in drafting this language.<sup>79</sup> The court relied on statements introducing

73. *Id.* at 7-9, 15-16.

74. *Id.* at 28, 54-59.

75. ILL. CONST. art. X, § 1.

76. ILLINOIS STATE BOARD OF EDUCATION, STATE, LOCAL, AND FEDERAL FINANCING FOR ILLINOIS PUBLIC SCHOOLS 3 (1985-86) shows the state, local, and federal percents of funding at that time as:

YEAR	STATE	LOCAL	FEDERAL
1972-1973	36.72%	57.23%	6.05%
1971-1972	37.42%	56.70%	5.88%
1970-1971	39.61%	54.00%	6.39%
1969-1970	30.74%	64.51%	4.75%
1968-1969	27.94%	66.42%	5.64%
1967-1968	27.13%	67.84%	5.03%
1966-1967	25.04%	68.89%	6.07%

77. 55 Ill. 2d 94, 302 N.E.2d 46 (1973).

78. *Id.* at 96, 98-100, 302 N.E.2d at 47-49.

79. *Id.* at 98, 302 N.E.2d at 48.



this amended language in which the delegate proposing it described it as:

. . . in the Convention's usual fashion, horatory. I do not believe that it states a legally enforceable duty on the part of the state through the General Assembly, or otherwise.<sup>80</sup>

The court concluded:

In view of the history of the proposal and the repeated explanations of its principal sponsor, it cannot be said that the sentence in question was intended to impose a specific obligation on the General Assembly. Rather its purpose was to state a commitment, a purpose, a goal.<sup>81</sup>

Thus "primary responsibility for financing" has been deemed to be merely horatory in nature—a goal not a duty.

Although there is not a constitutional duty on the General Assembly to provide 51% of the financing of public schooling there are recent developments which indicate the concern is not dead. In the present session of the General Assembly there is a bill pending, SB-1530, which requires the state to fund 51% of the cost of elementary and secondary education beginning with the 1988-89 school year.<sup>82</sup> The reality is that if the trend of the past two decades continues the state will be picking up 50% of the tab for education. From 1966 to 1986 the state's percentage of financing increased from 25.04% to 40.97% while the local communities percentage decreased from 68.89% to 51.71%.<sup>83</sup>

#### VIII. ARE INEQUITIES INHERENTLY INEFFICIENT?

Although *Blase* appears to have disposed of the state's primary responsibility by calling it a goal, one could suggest that the issue is not dead. If it is a goal as determined by the Illinois Supreme Court, one may ask, "How long can a goal go unrealized before there arises a duty to achieve it?" There is an interesting argument which would relate the requirement on the state to "provide for an efficient system of high quality public educational institutions and services," with its "primary responsibility" to finance education.

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80. *Id.* at 99, 302 N.E.2d at 49 quoting RECORD OF PROCEEDINGS, *supra* note 1, Vol. V, at 4145-49.

81. *Blase v. State*, 55 Ill. 2d at 94, 100, 302 N.E.2d 46, 49 (1973).

82. S.B. 1530, 85th Gen. Assembly (1987-88).

83. STATE, LOCAL, AND FEDERAL FINANCING FOR ILLINOIS PUBLIC SCHOOLS, *supra* note 76, at 3.

One could argue that a state system which does not correct wide discrepancies in local funding so as to provide equality of educational opportunity is failing to meet its obligation to provide an efficient system of public education.<sup>84</sup> In a New Jersey case attacking funding statutes and considering New Jersey's constitutional requirement of a "thorough and efficient system of free public schools," the court found the statutory scheme had no relation to equal educational opportunity because of the discrepancies in dollars spent per pupil.<sup>85</sup> Even if there is not a federal constitutional right to education, there is an equal protection entitlement for those rights granted under the state law. Where the state's constitution (1) provides for a fundamental goal of the educational development of all persons to the limits of their capacities, (2) requires an efficient system of high quality public educational institutions and services, and (3) imposes on the state the primary responsibility for financing the system of public education, it should be possible to find that a state funding mechanism which allows disparate funding so that not all persons are receiving services that promote educational development to the limits of their capacities is an inefficient system and violative of Section 1 of Article X of the 1970 Illinois Constitution and the equal protection clause of the fourteenth amendment.

## IX. SUMMARY

This article has limited itself to discussing policy questions raised by a review of Section 1 of Article X, which establishes the goals, purposes of, and financial responsibility for, public education. Litigation subsequent to the enactment of the 1970 Constitution requires that there be some consideration of whether to modify certain provisions of Article X. Specifically the phrases "to the limits of their capacities" and "primary responsibility for funding" in Section 1 need to be pondered. Do they mean what they appear to say? Are they mere horatory values to guide but neither goals to be attained nor standards against which to judge performance? Would a new convention choose to state that they should be taken literally or choose to abrogate them entirely? Should the courts have viewed any constitutional principle as merely "philosophical" and not as imposing duties and responsibilities upon the government and investing rights

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84. See, Rathe, *Dividing the Pie More Evenly: Post-Rodriguez-Judicial Alternatives to School Financing in Illinois*, 6 LOY. U. CHI. L. J. 110 (1975).

85. *Robinson v. Cahill*, 62 N.J. 473, 516, 303 A.2d 273, 296, *cert. denied*, 414 U.S. 976 (1973).



in the governed? Statements at a convention could address *Pierce's* misconstruction. Rhetorically and by contrast, one might ask if those principles of the Bill of Rights, which underline our way of life, were viewed as mere philosophical goals and not rights of the people to be protected by the courts, how different would our social system be.

*Black's Law Dictionary* defines "constitution" as follows:

In American law. The written instrument agreed upon by the people of the Union or of a particular state, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or ordinance of any such department or officer is null and void.<sup>86</sup>

At any future constitutional convention, in any debate on the goals, purposes and financing of public education, the delegates should make it clear that whatever language is agreed upon that language establishes rights and obligations, not mere "pie-in-the-sky" phrases to be dismissed by the courts as philosophical.

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86. BLACK'S LAW DICTIONARY 272 (5th ed. 1979).





# Reconsidering the Amendatory Veto for Illinois

JACK R. VAN DER SLIK\*

## I. INTRODUCTION

A significant accomplishment of the Sixth Illinois Constitutional Convention was to strengthen the machinery of Illinois government to make its branches more flexible and to facilitate political give and take. The 1870 Constitution embodied a great deal of distrust of the legislature. The legislature had been constrained to cramming the work of a biennium into a few months, adjourning *sine die* at or about June 30th every odd numbered year. Oversight was a joke. Consideration of veto messages was a freak event. Post-session interaction by legislators with the governor tended to focus on patronage and electoral considerations.

The 1970 Constitution unshackled the legislature to make policy and oversee its implementation. In a creative way the convention enhanced both the legislature and the executive by the changes in the new constitution. The new constitution gave the legislature and its constitutional leaders continuous life whether or not it was actually in session. The governor obtained a wider range of legislative tools including those for budget development and management. As chief executive s/he was given greater authority to organize and manage the executive branch. Veto powers enlarged gubernatorial discretion. The governor can totally veto bills and appropriations, even items in appropriations. But s/he can exercise fine tuning tools as well, reducing items in appropriations and rewriting substantive legislation by means of the amendatory veto.<sup>1</sup> Not only can and does the legislature come back to reconsider vetoes, the traditional requirements to over-

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1. Walters, *Comment: Illinois Amendatory Veto* 11 J. MARSHALL J. OF PRAC. & PROC., 415-40 (1978). See also Dillard, *The Illinois Amendatory Veto Revisited: How Far Can the Governor's Magic Constitutional Pen Reach?* 76 ILL. B.J. 598 (1988).

ride the governor have been relaxed. The override requires a three-fifths constitutional majority in both chambers, not the two-thirds majority required under the 1870 Constitution. To defeat the governor's reduction veto, only concurrent majorities are required to restore the legislature's originally appropriated amount. So the constitution, reflecting the political culture of the state, has structured state government to make public policy through a system of brokerage, negotiation and exchange.<sup>2</sup>

## II. LEGAL AND OPERATIONAL CONSIDERATIONS

One of the unique provisions created for the people of Illinois by the Sixth Illinois Constitutional Convention is the amendatory veto. It is but one part of Section 9 in the Legislative Article of the 1970 Constitution, and reads as follows:

(e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of the members elected to each house. Such bill shall be presented again to the Governor and if he certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, he shall return it as a vetoed bill to the house in which it originated.<sup>3</sup>

The procedure is straightforward. The governor sends back a bill as passed by the General Assembly with a message indicating exactly how s/he wants its language changed. Considering it "in the same manner as a vetoed bill" means that all procedural requirements of handling any vetoed bill apply to ones for which the governor has "specific recommendations." The bill is handled first in the chamber of its origin. The rules of the Senate and House are not exactly alike, but are procedurally similar.<sup>4</sup> In the Senate, "motions with respect to bills returned by the Governor may be made by the sponsor or by any member who voted on the prevailing side on the vote on final passage of the bill in question."<sup>5</sup> In the House, any member "desiring

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2. J. VAN DER SILK & D. REDFIELD, *LAWMAKING IN ILLINOIS: LEGISLATIVE POLITICS, PEOPLE AND PROCESSES* (1986).

3. ILL. CONST. art. IV, § 9.

4. See *HANDBOOK OF THE ILLINOIS LEGISLATURE 89-90* (1985) (Senate Rule 54) [hereinafter *HANDBOOK*].

5. *HANDBOOK*, *supra* note 3, at 89-90 (Senate Rule 54).



to take action with respect to a veto shall file a written motion with the clerk'' to do so.<sup>6</sup> Informal norms require that the motion be made by the sponsor of the bill.

The mover has three choices with regard to the bill "returned with specific recommendations."<sup>7</sup> One is a motion to accept the governor's specific recommendations, inserting into the bill "the language deemed necessary to effectuate the specific recommendations."<sup>8</sup> This action requires a constitutional majority for passage: 30 votes in the Senate; 60 in the House.

The second choice available in both chambers is to treat the bill as if it were vetoed and to move that the bill pass "notwithstanding" the governor's specific recommendation for change. This motion passes with an affirmative vote of a three-fifths majority of the elected members: 36 votes in the Senate; 71 in the House. This veto override action by an extraordinary majority enacts the bill in the same language it had when it first passed out of the legislature.

There is a third choice, the choice to take no action on the governor's specific recommendations. If both houses fail to accept the governor's recommendations and both houses fail to override the vetoed bill, then the bill dies.

In recent years these choices have been exercised by the General Assembly as it has responded to governors who have employed all their veto options. Table 1 provides statistics on the legislative workload from 1973 through 1986.<sup>9</sup> The first two columns, 1973-74 and 1975-76 cover the Democratic administration of Governor Daniel Walker. The remaining biennia are for the Republican administration of Governor James R. Thompson. While the workload has varied rather substantially,<sup>10</sup> the percentage of bills passed and sent to the governor has fluctuated between 26.4% and 32.7%, while the numbers ranged from 1159 to 1780. The percentage of bills signed by the governor has been rather steady, varying between 77.5% and 84.9% percent. Vetoes in full have seemed to decline, going down each biennium except for 1983-84, and ending at 7.8% of the bills sent to

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6. HANDBOOK, *supra* note 3, at 226 (House Rule 47(a)(1)).

7. HANDBOOK, *supra* note 3, at 90-91, 227-28 (Senate Rules 55, House Rule 50).

8. HANDBOOK, *supra* note 3, at 90-91 (Senate Rule 55). House Rule 50 is the same, but substitutes the word "accept" for the Senate's word "effectuate." HANDBOOK, *supra* note 3, at 227-28 (House Rule 50).

9. *See infra* app. at Table 1 at p. 778-79.

10. The bills introduced in 1981-82 are only 71.1% of the number in the peak year, 1975-76. *Id.*

the governor. Few full vetoes are overridden, ranging from 5% to 18%.

The governor's use of the amendatory veto has grown steadily. The percentage increased from 3.9% in Walker's first biennium to 10.8% by Thompson in 1983-84, followed by a decline to 7.1% in 1985-86. Clearly the legislature approves most of the "specific recommendations," the percentage dipping under 70% only in the last half of Walker's administration. Thompson's approval rate has not been lower than 80%. Overrides are rare, typically about 5%. The "no action" response has been more variable, and the median of the percentages shown is 14.7% in the most recent biennium.

These numbers help to explain the political situation of the bill sponsor. In the General Assembly, members put a premium on sponsoring bills and getting their bills passed. This is quite different from Congress, where the bills of individual members lose their identity by emerging in a committee bill. In the General Assembly, members jealously protect the substance of their bills and take pride in carrying them through the process. Informally, they even refer to their "batting average" for getting bills enacted. Only a third or fewer of the bills get to the governor's desk. Sponsors want those bills to survive.

The veto is a deadly tool. Despite the fact that the constitutional three-fifths majority to override is not nearly as steep as the federal model,<sup>11</sup> it still presents a difficult barrier. Since party loyalty is often involved on veto roll calls and no governor's party has had less than 40% of the seats, overrides cannot be accomplished without defections from members of the governor's party in both chambers. In short, a governor's veto is rarely overridden.

When the governor is opposed to a bill that has been passed, the bill sponsor is in a relatively weak position compared to the governor. Because veto in full will kill most bills, the bill sponsor may therefore welcome, or even invite, an amendatory veto. Interest groups can offer endless suggestions for changes for the governor to consider. Therefore, the legislative sponsor may be able to salvage "something" by obtaining an amendatory veto from the governor. The sponsor's weakness continues in the legislative environment. With an amendatorily vetoed bill, for the sponsor to take no action is a total loss. Seeking an override is highly chancy and loses in nearly every instance. Therefore, the sponsor's typical action is to ask the legislature accept

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11. U.S. CONST. art. I, § 7, cl. 2. The United States Constitution requires a two-thirds vote by each house to override a presidential veto.



the governor's recommendations, get at least 60 votes in the House and 30 in the Senate, and pass the bill including the governor's changes.

### III. LEGISLATIVE CONCERNS

Legislators frequently express concern that the amendatory veto intrudes too deeply upon the legislative process. The intrusion takes several forms that change what may be thought of as a normal legislative pattern.

#### A. EARLY CONSIDERATIONS OF BILLS

In states where the amendatory veto is not available it is normal for chief executive to be closely attentive to bills beginning their paths to enactment. For bill sponsors the hurdles during early consideration are the committees, interest groups, legislative policy specialists and staff when bills are considered in committee and the amending stage. In Illinois, the governor and her/his staff are rarely visible in this significant shaping stage for legislation. They have nothing to lose by failing to bargain and nothing to gain by indicating highly specific issue positions early in the process.

#### B. LATE SESSION EXECUTIVE BEHAVIOR

The governor concentrates attention upon major legislation and the balance of revenue measures and spending. The focus in legislative bargaining is upon the governor and four top leaders (House Speaker, Senate President, and the Minority Leaders of those two chambers). Compromises concerning the substantive language of bills are primarily on major legislation, not the hundreds of less conspicuous bills on which ordinary members have spent most of their time.

#### C. POST-PASSAGE CONSIDERATION

After House and Senate consideration in committees, on the floor and in conference committees, the final passed version of 1600 or more bills go to the governor. After passage, the legislature has 30 days to transmit the bills, and the governor has 60 days to apply the veto powers to them. While that load of bills constitutes a huge task, it is only a third to a quarter of the bills introduced. The governor can ignore the thousands of amendments alive at one time or another during the session. The governor has substantial resources at hand to make her/his judgments. Besides her/his considerable staff, s/he can call upon the executive departments for recommendations. Informally s/he has access to any lobbyist or even legislator from whom s/he

wants to hear on any issue. In contrast to the public process of the legislature, with its open hearings, public record votes and daily accessibility of participants to lobbyists, citizens and the press, the governor proceeds through the veto process with great discretion regarding whose opinions to consider in her/his decisionmaking. S/he has great leverage for bargaining, and can hold legislation of her/his choice hostage to gaining support from others. Not much involved in the earlier legislative bargaining, s/he now enters upon the veto process with few substantive commitments. The amendatory veto means s/he can combine elements from several bills. Legal limits on her/his discretion are almost nonexistent.

#### D. LEGISLATIVE RESPONSE TO VETOES

As noted earlier, the legislature can act on the governor's vetoes. However, the issues are framed in the governor's language. Legislators are barred from amending the governor's "specific recommendations." The governor can focus public attention on issues better than legislators can. Interest groups and sometimes specific legislators have frequently given commitments of support to the governor for her/his specific recommendations. Overturning the governor requires an extraordinary majority, necessitating that members of her/his own party to be part of the governor's opposition. Bargaining is essentially over passage or defeat, not substantive fine tuning of the legislative language.

#### IV. LEADER HYPERBOLE

Frequently legislators have expressed frustration and concern about gubernatorial use of the amendatory veto. The notion that governors have exceeded their constitutional authority has been argued by numerous legislators. Speaker Michael J. Madigan was quoted as follows:

Every governor has exceeded his authority and Governor Thompson, I think, has made more use of the amendatory veto than any other governor. In many instances, Gov. Thompson has made policy decisions, and that clearly was not intended. . . . We no longer have a true separation of powers.<sup>12</sup>

Governor Thompson has responded simply that legislators are "free to reject an amendatory veto anytime they feel it goes too far,

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12. Sevensen, *The Amendatory Veto: To Be or Not To Be So Powerful?* ILL. ISSUES, Feb. 1985, at 16.



and on some occasions they have. They retain the final say, which is the best safeguard of the amendatory veto I know.”<sup>13</sup> Others close to the governor are quick to note that legislators themselves often ask the governor to make specific amendments in bills they themselves sponsored and got passed by the General Assembly. By implication, it is argued, legislators acknowledge the need for an amending process that follows legislative bill passage.

## V. CONSTITUTIONAL HISTORY

William S. Hanley, who was legislative counsel to Governor Richard B. Ogilvie, has reviewed the veto powers of the Governor of Illinois and argues that the amendatory veto has been an accepted, if only occasionally used, practice since statehood in 1818.<sup>14</sup>

Under our first constitution, the veto power was held in a “Council of Revision” consisting of the justices of the Supreme Court and the governor. This council repeatedly sent enacted bills back to the General Assembly with suggested specific amendments which were then offered to the previously enacted bills, adopted, and sent back to the council for final approval. Two-thirds of all vetoed bills were handled this way for 30 years. When the council was abolished with the 1848 Constitution, a new procedure with the same effect was adopted although not used as widely. . . .

Under the 1870 Constitution, a more direct procedure was employed. On at least one occasion, the governor vetoed a bill but stated in his message what was necessary to make the bill acceptable. The originating house amended the bill to comply with the governor’s corrections, repassed it, sent it to the other house for approval, and then sent it back to the governor who signed it into law. Although this incident occurred in 1907, the action was not exactly an obscurity since the Illinois Supreme Court gave its subsequent blessing to the constitutionality of the proposal and reviewed the procedure without judicial comment.<sup>15</sup>

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13. *Id.*

14. Hanley, *Should the Amendatory Veto Power Be Curbed? No* ILL. ISSUES, Sep. 1977, at 11-12. See Hanley, *The 1970 Illinois Constitution and Executive Veto*, PUBLIC AFFAIRS BULLETIN Jan./Feb., Mar./Apr. 1972, at 1-19, reprinted in ILLINOIS GOVERNMENT AND POLITICS: A READER, 87-111 (W. Hall ed. 1975).

15. Hanley, *Should the Amendatory Veto Power Be Curbed? No*, ILL. ISSUES, Sept. 1977, at 11 citing *People v. Brundage*, 296 Ill. 197, 129 N.E. 500 (1921).

Two points may be noted about Hanley's observations on the amendatory veto under the 1870 Constitution. First, he refers to the changes made as the legislature amending the bill to comply with the governor's "corrections." Thereafter, he notes, the practice described "fell into disuse for 50 years."

Preparatory to the Sixth Illinois Constitutional Convention, a series of issue papers were developed and published.<sup>16</sup> Among them was one entitled "The Executive," written by Dawn Clark Netsch, who wrote from the vantage point of a law professor and former staff member of Governor Otto Kerner. The underlying assumption of the paper was that "Illinois state government is best able to fulfill its function . . . in the presence of a vigorous, strong governor. . . ."<sup>17</sup> The concluding section of the paper was on the legislative powers of the governor, mostly discussing the veto. After comments on the "item or section veto," she concluded on a suggestive note:

An alternative to the section veto is the amendatory veto, which permits the governor, instead of disapproving an entire bill, to return it to the legislature with his recommendation for change. The legislature is required to vote on his recommendations before reconsidering the bill. Four state constitutions (Alabama, Massachusetts, New Jersey and Virginia) grant the governor the power of amendatory veto in varying forms. The evidence indicates that it has worked well, and several leading students of the state executive are enthusiastic about its potential for improving legislation. The amendatory veto would undoubtedly work better where the state legislature did not pass the bulk of the legislation in the closing days of the session.<sup>18</sup>

Many members of the constitutional convention came with specific ideas about what they wanted in or out of the next constitution. The mechanism for accessing these ideas from con-con members was for them to submit "member proposals" and all told members submitted 582 proposals. Member proposals varied from a few lines to several pages in length. While substantive committees were not limited to using only these proposals, the proposals constituted elemental substance for committee refinement into constitutional articles.

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16. Gove & Ranney, CON CON: ISSUES FOR THE CONSTITUTIONAL CONVENTION (1970).

17. Netsch, *The Executive*, CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 144-82 (Gove & Ranney, eds. 1970).

18. *Id.*, at 179-80.



Relatively few proposals pertained to the veto powers and only four dealt with the amendatory veto. Two of those were elements in lengthy proposals about the legislature generally. The remaining two focused only upon the idea of an amendatory veto.

William D. Fogal submitted Member Proposal 37, a comprehensive draft of powers for a unicameral legislature. Among its 19 sections were veto provisions in Section 17 for a total veto, an "item or section" veto, a reduction veto, and an amendatory veto. The legislature could override by a two-thirds majority. The amendatory veto was described this way:

The Governor, in returning with his objections a bill for reconsideration at any general or special session of the legislature, may recommend that an amendment or amendments specified by him be made in the bill, and in such case the legislature may amend and re-enact the bill. If a bill be so amended and re-enacted, it shall be presented again to the Governor, but shall become a law only if he shall sign it within 10 days after presentation; and no bill shall be returned by the Governor a second time.<sup>19</sup>

This handling of the governor's recommendations is an amendment and repassage process. Presumably the passage requirement would be "a majority of members present and voting," as required in Section 16 of this Member Proposal.

Member Proposal 198 was sponsored by Louis J. Perona and four others. It proposed that the veto section of the new constitution contain a provision substantially as follows:

In addition to any veto power provided in this Section, the Governor has the right to exercise a conditional veto in which he may indicate that he will veto a bill unless the General Assembly agrees to a change suggested by him in the particular bill. In such event, if the majority required to originally pass the bill agrees to the change, the bill with the change then becomes law. If the majority required to originally pass the bill fails to agree to the change, the veto of the Governor terminates the bill unless passed by the General Assembly over his veto in the same manner as provided in this Section for approving bills after veto.<sup>20</sup>

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19. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1970, RECORD OF PROCEEDINGS, Vol. VII, 2865.

20. PROCEEDINGS, *supra* note 19, Vol. VII, at 2929.

The Perona proposal provided the governor an explicit means to bargain with the legislature, and set the standard for getting approval for his version as a majority. Overturning the governor would presumably necessitate an extraordinary majority, consistent with that needed with other vetoes.

Dawn Clark Netsch, as a convention member, along with a co-sponsor, submitted Member Proposal 521 on March 3, the cut-off date for such proposals. It called for an amendatory veto along the following lines:

In returning a bill without his approval to the house in which it originated, the Governor may recommend amendments to the bill to satisfy his objections. In such case the house in which the bill originated will first proceed to vote on the amendments recommended by the Governor and then vote on the bill as amended, if the amendments were adopted. If passed, the bill will then be sent to the second house where the same procedure will be followed, after which the bill will be presented to the Governor for his final approval or disapproval.<sup>21</sup>

The Netsch proposal made gubernatorial changes "amendments," each to be treated procedurally as amendments. There is no reference to overriding the governor.

Anthony M. Peccarelli also made the March 3 deadline with Member Proposal 582, the last one in the record. Twenty sections long, it offered a draft of a complete legislative article for a unicameral legislature which would choose a governor and cabinet. The governor's veto powers resemble those in the earlier Fogal proposal and the paragraph about gubernatorial amendments is almost verbatim the same as Fogal's.<sup>22</sup> The final passage provision in the Peccarelli draft was a majority of members elected to the Senate.

The Executive Committee brought out only one proposal, complete in its content.<sup>23</sup> Section 33 defined the amendatory veto:

Within 60 days after the presentation of any bill to the governor, he may refer the same back to the house in which it originated with specific suggestions for change. If, upon reconsideration initiated by the originating house, the specific revision recommended by the governor is adopted by both

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21. *Id.* at 3078.

22. *Id.* at 3111-12.

23. PROCEEDINGS, *supra* note 19, Vol. VI, at 335-412.



houses, each having 15 days in which to act, following a ye and nay vote entered on their journals, the governor shall then certify on the bill that it conforms to his suggestions and it shall become law. Otherwise, the bill shall be considered as having failed of passage, unless again passed as in the case of a bill vetoed on its entirety.<sup>24</sup>

This language is consistent with the earlier proposals. The governor's "specific revision" can be adopted by concurrent majorities, but the unrevised bill, "having failed of passage," is treated as a vetoed bill, passible in its original language only by the extraordinary majority necessary with vetoed bills. That majority, specified in an earlier section, was to be a three-fifths majority in each house. The Executive Committee proposal was accompanied by the committee's own explanation and commentary:

This proposed section, which has no counterpart in the existing Illinois Constitution [sic.], offers an alternative to the veto which will be especially helpful when the Governor finds reason to object to portions of a bill whose general merit he recognizes. For example, he is now with some degree of regularity compelled to veto some measures merely because of a technical flaw in their wording.

Under the proposed section, he would have the alternative of using a qualified veto which points out the specific changes necessary to make the measure acceptable. If the General Assembly concurs in those changes by a majority vote, delays incident to starting completely anew would be avoided. These are Alabama, Massachusetts, New Jersey and Virginia. All reports from those jurisdictions indicate that the procedure has been found useful by both the Governor and the General Assembly.<sup>25</sup>

When the Executive Committee's proposal got its first reading Frank Orlando spoke on behalf of the Executive Committee. Dawn Clark Netsch inquired about the latitude the legislature would have when responding to the governor's recommended revisions. Orlando responded that the legislature could only accept the governor's language. Pressed further, Orlando enlisted aid from fellow committee member, Ron Smith. From there the transcript is as follows.

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24. *Id.* at 351.

25. *Id.* at 403.

MR. SMITH: Mrs. Netsch, in the event that the legislature decided to tamper with the language or to change the returned legislation in any way, then the legislature would start from scratch. It would go back into committee, and the legislature would begin anew the whole process of presenting that bill to the legislature.

This provides for only precise corrections accepted by the legislature.

MRS. NETSCH: May I pursue that question?

PRESIDENT WITWER: Yes, go ahead, Mrs. Netsch.

MRS. NETSCH: Then their failure to adopt the precise suggestion that the governor makes by a majority vote—the failure of either house to adopt that precise language—has the effect of a veto of that bill, and the only way that the matter can be revived at that point is by the legislature introducing a new bill and starting the whole process over again. Is that—am I correct in my understanding?

MR. R. SMITH: That's right.

MR. ORLANDO: That is my understanding also, Mrs. Netsch.

MR. R. SMITH: We had testimony to the effect that many of the bills that are returned are returned for corrections or for simple deletions—simply to clean up the language. If the legislature can, instead of sending something back into committee, take care of that kind of problem in one day, we felt that that would be a substantially progressive move.

MRS. NETSCH: Then it was the committee's thought that the conditional veto would be available only to correct technical errors?

MR. ORLANDO: No ma'am.<sup>26</sup>

The next questioner went on to ask about whether the legislature could revise the governor's changes, and the floor discussion never came back to how much discretion the governor had with his specific recommendations.

Although on first reading the veto provisions were contained in the article on the executive, when these provisions came back from the Committee on Style, Drafting and Submission for second reading, they had been incorporated into the legislative article. They appeared as Section 9, with five subsections, a-e. The amendatory veto, was as follows:

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26. PROCEEDINGS, *supra* note 19, Vol. III, at 1356.



(e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of all the members of each house. If the Governor certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, the bill shall be returned to the house in which it originated and shall be considered as a vetoed bill.<sup>27</sup>

Although this paragraph was a complete rewrite of the first reading language, the Committee on Style, Drafting and Submission indicated that its new language only made clearer the intent of the convention that legislation not “ping-pong” back and forth between the legislature and governor.

The subsection makes it clear that, the first time around, the General Assembly may either override the governor by a three fifths vote or accept his recommendations by a majority vote, but that, the second time around, the General Assembly is limited to a straight override.<sup>28</sup>

In no way did this language propose to substantively limit the governor’s discretion in her/his “specific recommendations.” When the legislative article came to the floor on second reading, August 12 and 13, 1970, there was relatively little discussion of the veto. What attention there was focused upon the item reduction veto. A motion to delete it failed as did one to require restoration of a reduction by concurrent three-fifths majorities in both houses.

The motion to delete the reduction veto came from Paul Elward, concurrently a Representative in the General Assembly and a Chicago Democrat. During the debate references were made to the amendatory veto (section 9e):

MR. ELWARD: I think with the present power of the item veto, plus the language that I propose to leave unchanged in section 9(e) where the governor may return a bill with recommendations for change, and given the almost continuous sessions of the legislature in this area, I think we have reached all of the situations that ought reasonably to be reached . . . .<sup>29</sup>

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27. PROCEEDINGS, *supra* note 19, Vol. VI, at 1532.

28. *Id.* at 1554-55.

29. PROCEEDINGS, *supra* note 19, Vol. V, at 4082.

Elward's motion was seconded by William A. Sommerschild, an Elmhurst Republican who previously served on the legislative staffs of Republican leaders in the House and Senate. Supporting Elward, he argued that the reduction veto broadened an already broad range of veto powers, assuming the inclusion of the amendatory (conditional) veto:

MR. SOMMERSHIELD: I don't think we have provided, in my own opinion, a house—a legislature, rather—which is sufficiently powerful to overcome the control that the governor would have if we did not adopt this amendment and get rid of the reduction veto. I think with the amendatory veto and the item veto we have given them certainly a great deal of authority, and with the conditional veto you can use that as a reduction veto any way and say that he will reduce an item conditional on the legislature's action.

I think that, in essence, is a reduction veto, yet it has the safety of building into the system the reaction by the legislature before a conditional veto takes effect. I think that is much safer. I think it provides a firmer check on the action of the executive, and I would urge you to adopt the Elward amendment.<sup>30</sup>

Elward's motion was defeated, but the Sommerschild view of the broad application that the amendatory veto would have is unchallenged in the record. The section as approved was included with Sections 4 through 16 on a vote of 94 to 1,<sup>31</sup> after which the Convention continued to struggle with single member districts versus cumulative voting for the House.

On August 14, 1970 the convention completed second reading action on all the substance of its work. After a two-week break it reconvened to consider its finished handiwork. On August 27, 1970 the Style, Drafting and Submission Committee came back to the Convention with Proposal 15, a complete draft of the document along with explanations of changes in phraseology. Its proposed language for Article 5, Section 9(e) is what was finally enacted by the convention. With regard to the beginning of the third sentence, the committee explained that "[s]uch bill shall be presented again to the Governor and . . . [t]his language makes explicit what was implicit,"<sup>32</sup> and explained the matter no further.

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30. *Id.* at 4083.

31. *Id.* at 4106-07.

32. PROCEEDINGS, *supra* note 19, Vol. VII, at 2531, 2601.



During the oral presentation of the section there were no questions or particular attention given to the veto powers. The current constitutional provisions were effectively decided when the proposed legislative article passed on third reading on August 31, 1970.

The convention prepared its own "official text with explanation" of the proposed 1970 Constitution. With regard to the amendatory veto it said of the governor, "He will also have the 'amendatory veto' power which allows him to return a bill to the house in which it originated with his objections to it and suggestions for changes."<sup>33</sup>

## VI. SEARCH FOR SUBSTANTIVE LIMITS ON THE AMENDATORY VETO

It is noteworthy that none of the member proposals for an amendatory veto made any substantive attempt to limit the breadth of the governor's discretion in recommending revisions or amendments. No proposal constrained the amendatory veto of the governor to technical corrections and matters of form in bills. They simply refer to "changes" and "amendments."

An early witness before the Executive Committee which drafted the veto powers, was William Handley, then Governor Ogilvie's legislative counsel. His views have been noted above. He argued for strengthening the governor's power, and specifically advanced his views that the governor should have an amendatory veto in order "to 'correct' a defect in a measure through partial amendment, rather than veto the entire bill. He further suggested that the legislative override of such a veto be limited to a simple majority."<sup>34</sup>

When the Executive Committee brought out its proposal for first reading, its commentary on the amendatory veto gave a hint that the governor might assume a narrow view of the amendatory power. It implied that technical flaws in bills were common place, but correctable by the amendatory veto. But that application of the power was only cited as an example of a reason why the governor might object to a portion of a bill. The example is not a limitation on a governor's reasons.

The very brief floor debate in the constitutional convention on the meaning of the amendatory veto has evoked subsequent comment by convention members. Intimates to the process indicate that Orlando did not represent the true intent of the Executive Committee. Dwight P. Friedrich, a member of the committee and one of the designees of

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33. PROCEEDINGS, *supra* note 19, Vol. I, at 704.

34. GERTZ & PISCIOTTI, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 218 (1980).

Chairman Joseph Tecson as "our veto team,"<sup>35</sup> later expressed that judgment in an *Illinois Issues* essay.<sup>36</sup> Friedrich referred to Orlando's "No, ma'am," response to Netsch four times as an incorrect answer. He insisted that the preponderance of the debate record indicated that the intention expressed in the committee and on the floor of the convention was to use the amendatory veto only for "technical errors," "precise corrections," "technical flaws," "simple deletions" and "to clean up the language." A similar assessment has been given by Arvid Hammers, Administrative Assistant to the committee's Staff Counsel, Jack F. Isakoff. According to Hammers, both he and Isakoff were at the side of the floor during the exchange between Netsch and Orlando. They visibly disagreed with Orlando's response to Netsch's question, but the answer went uncorrected into the record.<sup>37</sup> Netsch on the other hand, has since stated that she did not pursue the question further because she got the answer that she wanted at the time, namely, that gubernatorial discretion went beyond mere correction of technical errors.<sup>38</sup>

It is reasonable to imagine that convention members expected to debate the substance of the amendatory veto again on second and third reading stages of convention consideration, and that the exchange between Netsch, Smith, and Orlando might have obtained further elaboration. But the convention did not, and that exchange became the basis for interpreting the intent of the framers.

After adoption of the 1970 Constitution it did not take long for a case to get to the Illinois Supreme Court questioning the breadth of the governor's authority in the use of the amendatory veto. In *People ex. rel Klinger v. Howlett*,<sup>39</sup> rather than dealing with the issues of the case narrowly, the court took note that the scope of the governor's power with the amendatory veto "has not been clearly stated either in the constitution itself or in the committee reports or debates in the constitutional convention."<sup>40</sup> The court took note of language in the record, including Delegate Orlando's "No, ma'am"

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35. PROCEEDINGS, *supra* note 19, Vol. III, at 1337.

36. Friedrich, *Should the Amendatory Veto Power Be Curbed? Yes*, ILL. ISSUES, Sep. 1977, 10-12.

37. Hammer's classroom presentation on the 1970 Constitutional Convention, Sangamon State University delivered on September 22, 1987.

38. Personal conversation with the author at the first meeting of Speaker Michael J. Madigan's Task Force on the Amendatory Veto. Chicago, IL, August 20, 1984.

39. 50 Ill. 2d 242, 278 N.E.2d 84 (1972).

40. *Id.* at 248, 278 N.E.2d at 87-88.



response to Delegate Netsch. The court therefore concluded:

Upon the basis of the imprecise text of the constitutional provision and the materials before us in this case, we cannot now attempt to delineate the exact kinds of changes that fall within the power of the Governor to make specific recommendations for change. It can be said with certainty, however, that the substitution of complete new bills, as attempted in the present case, is not authorized by the constitution.<sup>41</sup>

Given the meager limitation on the amendatory veto through supreme court interpretation, the General Assembly adopted a constitutional amendment to substantively limit the governor's amendatory veto power to "the correction of technical errors or matters of form,"<sup>42</sup> during 1973. The issue went to the people on a constitutional referendum vote in November, 1974.

Prior to the referendum, Secretary of State Michael J. Howlett distributed an official explanation of the proposed amendment along with arguments for and against the amendment.<sup>43</sup> Arguments in favor included the following statements:

(1) Nobody knows how far a Government can go [under the existing constitutional provisions] in re-writing a bill which has passed the General Assembly. . . .

(4) The "amendatory veto" power discourages Governors from participation in the open, public development of new laws. It is easier, and often more dramatic, for a Governor to re-write bills to suit his own tastes after the General Assembly has gone home. This leaves the legislature to "take it or leave it". Only by an extraordinary 3/5 majority of both Houses can the legislature salvage its own legislation by overriding the Governor's action.

(5) The Constitution allows only 15 days for each House of the legislature to consider and vote on the Governor's amendments. This barely permits the General Assembly time to evaluate broad, significant changes proposed by the Governor. Most importantly, the opportunity for the public to react and express its views to legislators becomes impossible in many instances. . . . Finally, because technical changes and

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41. *Id.* at 248-49, 278 N.E.2d at 87-88.

42. 1973 Ill. Laws 3101.

43. Office of the Secretary of State of Illinois, Amendment to the Constitution of Illinois That Will Be Submitted to the Voters November 5, 1974, at 1-7 (1974).

changes in form can be evaluated relatively easily and quickly, the General Assembly will be able to act responsibly within the 15 days allowed each House to accept or reject the changes.<sup>44</sup>

Arguments against the proposed amendment refuted the advantages of the amendment and observed:

5. Adoption of the proposed amendment restricting use of the amendatory veto would invite litigation each time the veto is used by the Governor. The authorized changes would be those for the "correction of technical errors or matters of form". But these terms are not precise and have no fixed meaning . . . .

It is preferable to leave questions about the use of the amendatory veto, with the General Assembly, each time the Governor files recommended changes. There simply is no need for this proposal if the General Assembly is willing to assume its responsibility for either accepting a Governor's changes, letting a bill die, or overriding his veto.<sup>45</sup>

The electoral outcome was not close. While the proposed amendment had to have a majority, it received only 42.7% of more than three million votes cast at the election. It could have passed with three-fifths of those voting on the proposition, but it got only 49.5% of those votes.<sup>46</sup> Presumably the people weighed the reasons for restricting the amendatory veto and accepted the wide latitude announced by the supreme court in *Klinger* and the procedural constraints of the legislature already in place. The people, in effect, gave popular approval to the negative descriptions of status quo offered by advocates for change.

The previously arguable proposition, that Delegate Orlando was wrong about the Executive Committee's intent to limit the scope of the amendatory veto to technical corrections and errors, was made moot by the people's rejection of an explicit amendment to so limit the amendatory veto power. The supreme court made this clear in 1979 by ruling on the constitutionality of the corporate personal property replacement tax.<sup>47</sup> The governor used the amendatory veto to

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44. *Id.* at 4-5.

45. *Id.* at 6.

46. OFFICE OF THE SECRETARY OF STATE OF ILLINOIS, HANDBOOK OF ILLINOIS GOVERNMENT: 1987-1988 117 (1987).

47. *Continental Illinois Nat'l Bank & Trust Co. v. Zagel*, 78 Ill. 2d 387, 401 N.E.2d 491 (1979).



reduce the tax rate from 2.85% to 2.5% after the first year, and petitioners asserted that this usage exceeded the constitutional authority. After citing its interpretation in *Klinger* and noting con-con's *Record of Proceedings*, the supreme court said: "The absence of further clarification, of course, leaves unclear the drafter's intent as to the precise scope of the amendatory veto power. . . ." <sup>48</sup> The court went on to apply "the understanding of its provisions by the voters who, by their vote, have given life to the product of the convention." <sup>49</sup> Noting that the people rejected a proposal to narrow the amendatory veto, the court asserted:

When this public rejection of the proposed restriction is viewed along with the somewhat imprecise interpretation by the delegates, it is clear that his section 9(e) of article IV was not intended by the voters to restrict the amendatory veto power to a proofreading device. Although the point beyond which the amendatory veto power does not extend is not as clear from the constitutional debates or referendum, that point is not, in our judgment, reached here. The specific recommendations made by the Governor regarding House Bill 2569 contain no change in the fundamental purpose of the legislation, nor are they so substantial or so expansive as to render his use of the veto power violative of section 9(e) of article IV. <sup>50</sup>

Here, the court appears to set an outward substantive limit on the amendatory power of the governor. The governor may make no changes in the fundamental purpose of a bill, and he did not in the matter tested.

The most recent challenge responded to by the supreme court dealt with numerous tax issues, but also the amendatory veto. With regard to the latter, it expanded somewhat on the substantive limit on the amendatory power suggested in *Continental Illinois*:

It is clear that the power encompasses more than mere proofreading to correct technical errors. It therefore becomes a question of guided discretion to judge whether the changes are less than fundamental alterations but more than technical corrections. We think the changes made in the act at the bar

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48. *Id.* at 495.

49. *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 222, 390 N.E.2d 847, 853 (1979).

50. See HANDBOOK OF ILLINOIS GOVERNMENT, *supra* note 45, at 496.

fall within that middle area. They were intended to improve the bill in material ways, yet not to alter its essential purpose and intent. The changes constituted minor enhancements which spoke to the clarity, fairness and practical requirements of the Act. They did not exceed the scope of the Governor's amendatory veto power.<sup>51</sup>

Here the court found and approved qualitative improvements in legislation by the governor. This suggests the question, are only "enhancements" or changes "intended to improve a bill" constitutional? Would changes to water down the intent or make loopholes in application also "fall in the middle area?" The court may have opened for itself more subjectivity than the framers intended.

#### VII. RECENT SKIRMISHING—MADIGAN AND THOMPSON

Concerned about the extent to which Governor James R. Thompson has used the amendatory veto, in 1984 Michael J. Madigan, Speaker of the House, appointed a special task force "to study the need to modify the governor's amendatory veto."<sup>52</sup> While the task force was diverse, its members were mostly sympathetic to the legislative branch. After study, consultation and hearings the task force defeated a motion to recommend the abolition of the governor's amendatory veto authority. Then it adopted a proposal to recommend a constitutional change in the amendatory veto. This proposal would have allowed the legislature to adopt the governor's specific changes by a majority of members elected, but it could also reject the recommended changes by a constitutional majority, thereby overriding the amendatory veto and enacting the bill in the form in which it was originally sent to the governor.<sup>53</sup> This proposal was introduced to the 84th General Assembly,<sup>54</sup> but died because it did not obtain the necessary three-fifths support in the House (65 yeas, 47 nays, April 22, 1986).

Meanwhile, Governor Thompson defended as judicious his use of the amendatory veto while suggesting its vulnerability to court curtailment:

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51. *People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 403 N.E.2d 242, 251 (1980).

52. News release, Speaker Michael J. Madigan, House of Representatives, June 20, 1984.

53. Letter from Mary Margaret Jacobs, Counsel to the Speaker of the House, to Michael J. Madigan (December 4, 1984) (letter in permanent file at N. ILL. U.L. REV.).

54. H.J.R.-C.A. 0001, 84th General Assembly, 1985 Sess.



I've been very careful with the amendatory veto. I've done a lot of creative things with it—things which I think are good for the Illinois business climate. But you never know where the Supreme Court's going to step in (and perhaps declare it unconstitutional). Tort reform is particularly in the realm of the Supreme Court, and I don't want to be losing a very worthwhile power for this and future Illinois governors on an issue such as this one.<sup>55</sup>

By September, 1987, Speaker Madigan again concluded that Thompson's amendatory vetoes were insufficiently judicious. He gave notice of this concern in a press release on September 21, citing an agreement among House Democrats to "reject outright the governor's action on one measure, H.B. 1867, to establish a clear constitutional test of the amendatory veto power. . . ."<sup>56</sup> On September 22, when Representative Myron Kulas, sponsor of the bill, H.B. 1867, moved acceptance of the governor's amendatory veto, Speaker Madigan stated:

The Governor's specific recommendations for change with respect to House Bill 1867 changed the fundamental purpose of this Bill and made substantial and expansive changes contrary to the Illinois Supreme Court decisions. . . . After careful consideration of this issue, the Chair rules that with respect to his veto of House Bill 1867, the Governor has exceeded the scope of his authority granted to him by Article IV, Section 9e of the Illinois Constitution of 1970, to return a bill with specific recommendations for change. Therefore, Mr. Kulas's motion which incorporates the Governor's specific recommendations for change is out of order.<sup>57</sup>

A brisk debate of the constitutional issues followed, the Speaker's ruling was appealed, and the motion to appeal was defeated, with 49 "aye" votes to 66 "no." Because that day was the 15th calendar day after the bill had been returned with the governor's specific recommendations, the bill died. The governor took no action and offered no statements or press releases on the matter.

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55. *Guv Ponders Change in Sales, Income Tax in Wake of U.S. Reform*, CRAIN'S CHICAGO BUSINESS, Sept. 22, 1986, at 1, col. 1 (quotation at 70).

56. News Release, Speaker Michael J. Madigan, House of Representatives, Sept. 21, 1987.

57. ILLINOIS HOUSE OF REPRESENTATIVES, 85th General Assembly, 77th Legislative Day, Transcript of Debate at 3 (October 22, 1987) (Statement of House Speaker Madigan).

### VIII. CONCLUDING OBSERVATIONS

The 1970 Constitution writers strengthened and unfettered state government from impractical constitutional limitations. Both the legislature and governor were made stronger by, among other things, the veto powers. The governor has sharp and selective veto tools for both substantive and fiscal legislation. The legislature, which only overrode four vetoes under the 1870 Constitution,<sup>58</sup> has a much more realistic capacity to override vetoes today. The traditional two-thirds constitutional majority under the 1870 provisions gave the governor especially intrusive powers given the partisan competitiveness of the state and three-member districts with cumulative voting. Even after 1970 to get two-thirds or more of both chambers to vote against the governor would be a political rarity. To have continued that standard would have greatly inhibited veto overrides even after the cutback of the House. How then should the dispute over the use or abuse of the amendatory veto be viewed?

A. The dispute is a minor one, well within the range of expectable disagreement in a system of checks and balances. Madisonian democracy anticipated that the best check on the possibility of tyranny by government over the people was to create separate branches of government and give them incentives to check one another.<sup>59</sup> That legislators perceive abuse in the governor's exercise of amendatory discretion is hardly surprising. That a governor would resist a narrowing of that discretion is likewise expectable. But in the exercise of their options the legislature and governor have not brought government to a standstill. The amendatory veto is not the basis of a constitutional crisis.

B. The constitutional history of the veto powers reveals no consensus to substantively or qualitatively limit the governor's discretion with the amendatory veto. Even if Delegate Orlando's "No ma'am" was wrong at the time, the electorate rejected a formal amendment to implement that constraint. If Delegate Sommershield's remarks, suggesting that the reduction veto power was implicit in the amendatory veto, are exercised by a governor, the governor could amendatorily change appropriations not just downward, but upward as well.

C. The check on the governor has to be procedural, not substantive. To subject recommended changes to scrutiny about whether or not they are fundamental changes, much less whether or not they

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58. Netsch, *The Executive*, *supra* note 17, at 177.

59. THE FEDERALIST No. 51 (J. Madison).



are intended to improve the legislation in material ways, is to fall into subjective folly. The Illinois Supreme Court is moving in that direction.

The act of veto, including the amendatory veto, is a political act reserved to the governor. The constitutional process reserves to the legislature the possibility to respond with acceptance, rejection or override. The legislature is the most appropriate judge of whether or not the governor's suggestions for legislation go too far or not far enough.

D. Structural and procedural arrangements have made gubernatorial amendments too easy to effect and too difficult to defeat. Because gubernatorial amendments are too easy, the governor is not as involved in the legislature's amending actions as he would otherwise be. The bargaining, compromising and perfecting process in the legislature goes forward amid a general understanding by legislators, lobbyists and agency liaisons that the action completed in the legislature by June 30th is not final.

On the other hand, most citizens are inclined to think that the legislative process, which is constitutionally required to be performed in open sessions, with publicized hearings, record proceedings, record votes, and easy access by citizens and the press, is where public law is written. In fact, the governor gets her/his say much more privately. S/he can engage in as much or little consultation with people beyond her/his staff as s/he wishes. While some lobbyists, citizens, agency people and legislators do get the governor's ear to affect the substance of vetoes and veto messages, many do not. This is particularly relevant for the amendatory veto because the opportunity to recommend changes allows attention not only to major principles, but to minor details as well. The general veto—up or down—does not require lobbying of a negotiating sort. The general veto is not a tool for fine tuning. But the amendatory veto is. To manipulate legislation into what is intended as final form in the confines of an executive chamber does not square with the principle of requiring the legislature to have open processes.

The appropriate check on the governor's amendatory discretion is the capacity of the legislature to override. Theoretically the legislature has three options: accept the governor's recommendations by constitutional majorities in both houses; reject the recommendations by not acting to accept them; override the governor by three-fifths constitutional majorities in both houses. Actually only about five percent are overridden and fifteen percent allowed to die.

Procedural requirements bias legislative outcomes. Because the override is highly unlikely to succeed, the sponsor must choose either

to move acceptance of the governor's recommendations or let the bill die. People who know how the legislature works know that for bill sponsors, passing bills is the measure of success. So the bias of the system is such that after the policy making session of the General Assembly is over, the governor, under self-controlled access circumstances, can substantively rewrite legislation to slant it toward the satisfaction of groups, interests, agencies and partisan concerns that suit her/him and her/his supporters.

If the bias of the existing amendatory veto is bad, there should be a procedural remedy. The one proposed by Speaker Michael J. Madigan puts the legislature's original enactment on an even ground with the governor's recommended changes. The legislature can take no action, leaving the bill to die; accept the governor's recommendations by constitutional majorities in both houses; override the governor's recommendations and enact the originally passed language by constitutional majorities in each house.

This would change the bias of the amendatory veto. Instead of the bill sponsor calculating options after the governor's free shot at substantive changes, the governor would have to calculate. S/he could use the total veto to kill a bill with little likelihood of an override. However, if s/he would save the bill by specific recommendations, they would have to obtain majority support in the open, public processes of both legislative chambers to pass into law. Alternatively, the bill sponsor could save the version of bill that previously passed by getting majority support from both legislative chambers. Both versions would be subject to the same standard of legislative approval. All the legitimating features of open access and representational democracy would apply to both versions of the legislation after the options have been narrowed to two.

E. Providing that both the governor's recommendations and the previously passed version of the bill can be enacted by constitutional majorities, the amendatory veto would be procedurally comparable to the reduction veto. As an "original amount" may be "restored" to an appropriation bill by constitutional majorities,<sup>60</sup> so the legislatively passed language of a bill could be restored by the same kind of majorities. The fine tuning available on appropriations with the reduction veto is approximated by the fine tuning available in the amendatory veto. The two revisory veto powers would be symmetrical in the options available to the legislature. The total veto, with its three-fifths requirement for override, would remain along

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60. ILL. CONST. art. IV, § 9(d).



with the total veto on appropriation items and the same override requirement. These would continue as the governor's heavy artillery for veto. The revisory vetoes would allow specific amendments with legislative majorities necessary for override—a lighter kind of weaponry for engagements between the executive and legislative branches.

The legislative process should allow the key policy makers, members of the General Assembly and the governor, to build consensus. They represent different parts of the same statewide constituency. Their full interaction is needed to serve the needs not only of the parts but the whole. The mismatch of amendatory powers is not a matter of crisis proportions, but it does not well serve the balance of powers. It should be amended to put the veto powers into better symmetry and allow majority rule to have the primary place in the refinement of legislative language in state policy making.

TABLE 1  
ILLINOIS GENERAL ASSEMBLY WORKLOAD, 1973 THROUGH 1986

	1973-74	1975-76	1977-78	1979-80	1981-82	1983-84	1985-86
Bills introduced	4,602	6,082	5,345	5,689	4,383	5,251	5,990
Senate	1,684	2,047	1,893	2,045	1,693	1,960	2,317
House	2,918	4,035	3,452	3,644	2,690	3,291	3,673
Sentto goernor	1,508	1,780	1,736	1,711	1,159	1,722	1,606
Senate	656	702	695	672	568	713	734
House	852	1,078	1,041	1,039	591	1,009	872
Percent	32.7%	29.2%	32.4%	30.0%	26.4%	32.7%	26.8%
Bills signed*	1,232	1,430	1,401	1,434	958	1,335	1,365
Senate	530	573	546	555	473	537	635
House	702	857	855	879	485	798	730
Percent	81.8%	80.3%	80.7%	83.8%	82.6%	77.5%	84.9%
Vetoed in full	216	252	219	154	99	200	126
Senate	104	96	91	72	48	90	61
House	112	156	128	82	51	110	65
Percent	14.3%	14.1%	12.6%	9.0%	8.5%	11.6%	7.8%
Overriden	11	23	17	28	6	30	19
Senate	7	9	5	15	3	13	9
House	4	14	12	13	3	17	10
Percent	5.0%	9.1%	7.7%	18.1%	6.0%	15.0%	15.0%



Amendatory votes	60	98	116	123	102	187	115
Senate	22	33	58	45	47	86	38
House	38	65	58	78	55	101	77
Percent	3.9%	5.5%	6.6%	7.1%	8.8%	10.8%	7.1%
<i>Adopted</i>	46	68	95	107	89	151	92
Senate	15	23	50	41	41	70	35
House	31	45	45	66	48	81	57
Percent	76.6%	69.3%	81.8%	86.9%	87.2%	80.7%	80.0%
<i>Overridden</i>	3	5	3	6	6	20	6
Senate	1	3	2	1	4	8	0
House	2	2	1	5	2	12	6
Percent	5.0%	5.1%	2.5%	4.8%	5.8%	10.6%	5.2%
<i>No action</i>	11	25	18	10	7	16	17
Senate	6	7	6	3	2	8	3
House	5	18	12	7	5	8	14
Percent	18.3%	25.5%	15.5%	8.1%	6.8%	8.5%	14.7%
Appropriation reduced or item vetoed	99	104	39	49	131	68	135
Senate	51	58	21	28	80	37	78
House	48	46	18	21	51	31	57
Percent	6.5%	5.8%	2.4%	2.8%	11.3%	3.9%	8.4%

TABLE 1  
ILLINOIS GENERAL ASSEMBLY WORKLOAD, 1973 THROUGH 1986

	1973-74	1975-76	1977-78	1979-80	1981-82	1983-84	1985-86
Bills enacted	1,292	1,526	1,516	1,575	1,059	1,536	1,482
% of bills introduced	28.0%	25.0%	28.3%	27.6%	24.1%	29.2%	24.7%
% of bills sent to governor	85.6%	85.7%	97.3%	92.0%	91.3%	89.1%	92.2%

\* Includes appropriation bills reduced or item vetoed and 4 bills filed without signature (2 in 1973-74 and 2 in 1975-76).  
Compiled by the Legislative Research United staff from Laws of Ill. 1973-1984; and the Legislative Synopsis and Digest 1985 and 1986.  
File 9-273, July 7, 1987.



# A Search for Accountability: Judicial Discipline Under the Judicial Article of the 1970 Illinois State Constitution

PINKY WASSENBERG\*

Three issues have arisen since the adoption of the 1970 Illinois State Constitution which may be viewed as bases for revision of the Judicial Article's section on judicial discipline.<sup>1</sup> All three issues were brought to the fore in a 1977 Illinois Supreme Court decision, *Harrod v. Illinois Courts Commission*.<sup>2</sup> The issues raised in this case have become focal points of attention regarding Illinois' system of judicial discipline and their resolution will do much to determine the future character of that system.

Article VI, the Judicial Article of the 1970 Constitution, created a two-tiered system for the administration of judicial discipline consisting of the Illinois Judicial Inquiry Board<sup>3</sup> (hereinafter the "Board") and the Illinois Courts Commission<sup>4</sup> (hereinafter the "Commission"). The Board investigates charges of judicial misconduct, and if a charge is substantiated by its investigation, acts as prosecutor during the hearing. That hearing is conducted before the Commission, the adjudicator of all charges of judicial misconduct.

Only six other states have two-tiered systems separating the investigative and prosecutorial functions (performed by the Illinois Board) from the decision-making function (performed by the Commission).<sup>5</sup> This separation of functions is seen as a way of avoiding conflicts of interest that may occur when one entity investigates,

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1. ILL. CONST. art. VI, § 15.

2. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

3. ILL. CONST. art. VI, § 15(b)-(d).

4. ILL. CONST. art. VI, § 15 (e)-(g).

5. Five of the states are Alabama, Ohio, Oklahoma, West Virginia and Wisconsin. Delaware "also conforms to this pattern, except it is a three-tiered system. . . ." M. COMISKY & P. PATTERSON, *THE JUDICIARY: SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 153-54 (1987).

prosecutes, and rules on charges of judicial misconduct.<sup>6</sup> However, the other 44 states appear not to have found major conflict of interest problems with their unitary systems which have one organization performing all three functions.

Another unusual feature of the Illinois judicial discipline system is the extent to which the constitution limits state supreme court participation. Only two other states, Delaware and Oklahoma, do not provide for state supreme court involvement in their disciplinary systems.<sup>7</sup> In Illinois, this insulation of the judicial discipline system from the state's supreme court is explained as necessary to maintain public confidence in the integrity of the discipline system.<sup>8</sup> The underlying assumption is that the public doubts the credibility of a system to discipline judges which is an administrative entity within the judicial branch of government. However, forty-seven states give their supreme courts a role in judicial discipline by having them either rule directly on a complaint or review the merits of the decision of the body that made the initial ruling.<sup>9</sup>

The three issues raised by *Harrod* involve questions about the relationship between these two tiers of the discipline system and the Illinois Supreme Court under the 1970 Constitution.<sup>10</sup> The first issue is whether the Illinois Supreme Court has the authority to determine whether an action by either the Board or the Commission is beyond their authority under the Judicial Article.<sup>11</sup> The second issue focuses on identification of the standards to be used by the Board and the Commission in evaluating judicial conduct.<sup>12</sup> The third issue concerns what actions the Board and the Commission are permitted to take when they receive allegations of judicial misconduct based on the interpretation of a statute not yet clarified by an appellate court.<sup>13</sup>

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6. See Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.-KENT L. REV. 69 (1977); R. Cohn, *Comparing One- and Two-Tier Systems*, 63 JUDICATURE 244 (1979).

7. See COMISKY, *supra* note 5.

8. See Greenberg, *supra* note 6, at 73; Cohn, *supra* note 6, at 246-47.

9. *Id.* Some state supreme courts have ruled that they have an inherent power to discipline judges, short of removal. However, when the states' constitutions have been amended to include specific provisions for judicial discipline, the supreme courts have held that the constitutional provisions superseded the inherent powers. Cameron, J. *The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.-KENT L. REV. 45 (1977); COMISKY, *supra* note 5.

10. *People ex rel. Harrod v. Illinois Courts Comm'n*, 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

11. *Id.* at 457-62, 372 N.E.2d at 58-61.

12. *Id.* at 468-70, 372 N.E.2d at 63-64.

13. *Id.* at 471-73, 372 N.E.2d at 65-66.



The balance of this article will focus on the controversy surrounding the *Harrod* decision and examine the implications of these issues on the calling for another state constitutional convention.<sup>14</sup> As a foundation for that examination, Part I will summarize the evolution of judicial discipline in Illinois and describe in greater detail the current two-tiered discipline process. Part II will then consider and analyze the catalyst of the controversy, the *Harrod* decision.

## I. HISTORY AND BACKGROUND

### A. BEFORE 1964

The 1818 Illinois State Constitution provided two methods for the involuntary removal of a member of the state judiciary.<sup>15</sup> A judge could be removed from office for misdemeanors committed in office if a majority of the House of Representatives of the General Assembly voted to pass articles of impeachment, and two-thirds of the Senate voted to convict after sitting as the trier of fact and law on those articles of impeachment.<sup>16</sup> Alternatively, a judge could be removed from office for misconduct insufficient to warrant impeachment.<sup>17</sup> This method of removal required a resolution passed by a two-thirds vote of each house to remove a judge from office.<sup>18</sup> Both the impeachment and legislative removal provisions were continued in the 1848 Constitution.<sup>19</sup>

The 1870 Constitution continued the provision for impeachment<sup>20</sup> but modified the legislative removal provision. The modified provision allowed the General Assembly to remove a judge "for cause", after a hearing, upon a three-fourths vote of each house.<sup>21</sup>

The constitutional mechanism for impeachment was used only twice against state judges, once in 1832 and again in 1843. Both cases

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14. ILL. CONST. art. XIV, § 1(b) requires that the voters be given the opportunity to request a constitutional convention if, at the end of any twenty year period, one has not been called.

15. For a general discussion of the 1818 Illinois State Constitution and its successors, see G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* (1969); J. CORNELIUS, *CONSTITUTION MAKING IN ILLINOIS, 1818-1970* (1972).

16. ILL. CONST. OF 1818, art. II, § 22-23.

17. ILL. CONST. OF 1818, art. IV, § 5.

18. *Id.*

19. ILL. CONST. OF 1848, art. III, § 27-28 (impeachment power); art. V, § 12 (1848) (reasonable cause insufficient to impeach).

20. ILL. CONST. OF 1870, art. IV, § 24.

21. ILL. CONST. OF 1870, art. VI, § 30.

involved allegations of misconduct by state supreme court justices and both resulted in acquittal.<sup>22</sup>

#### B. THE 1964 AMENDMENT

In 1964, the Judicial Article of the 1870 Constitution was revised extensively through a constitutional amendment approved by the voters in 1962.<sup>23</sup> The new Judicial Article departed from the older practice of placing the responsibility for judicial discipline in the legislature. The 1964 Amendment created a new commission, the Illinois Courts Commission, and gave it primary responsibility for judicial discipline in Illinois.<sup>24</sup> The new Commission included one member of the supreme court chosen by that court, two members of the appellate court chosen by the appellate court, and two judges from the circuit court chosen by the supreme court.<sup>25</sup> The Commission was convened by the supreme court upon its own order or at the request of the Senate. It operated under procedures set down by the supreme court.<sup>26</sup> After a hearing, the Commission had the authority to order a judge retired for disability, suspended without pay, or removed from office for cause.<sup>27</sup>

The 1964 Amendment of the Judicial Article did not refer to the 1870 Constitution's Article II provision authorizing impeachment. This left open the question of whether or not the new judicial

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22. Greenberg, *supra* note 6, at 70.

In 1832 the Illinois House of Representatives voted articles of impeachment against Justice Theophilus W. Smith of the Illinois Supreme Court, charging him with "high misdemeanors." His trial before the Illinois Senate resulted in acquittal and a subsequent effort to remove him by address failed. In 1843 the Illinois House of Representatives voted articles of impeachment against Justice Browne of the Illinois Supreme Court and he, too, was acquitted by the Senate. The proceedings against Justice Browne were apparently the last attempt to remove an Illinois judge by impeachment. *Id.* citing W. BRAITHWAITE, WHO JUDGES THE JUDGES 96-97 (1970); G. FIEDLER, THE ILLINOIS LAW COURTS IN THREE CENTURIES 1673-1973 314 (1973).

23. ILL. CONST. art. VI (1964). Because the amendment was approved by the voters in 1962 but did not take effect until 1964, it is referred to as either the 1962 Amendment or the 1964 Amendment. For a description of events leading up its adoption, see BRADEN & COHN, *supra* note 15; Flamm, *Retirement, Suspension and Removal of Judges Under the Proposed Judicial Article*, 46 ILL. B.J. 966 (1958); FLAMM, *Retirement, Suspension and Removal of Judges*, 50 ILL. B.J. 695 (1962 Supp.).

24. ILL. CONST. OF 1870 art. VI, § 18 (1964).

25. *Id.*

26. *Id.*

27. *Id.*



discipline section worked as an implied repeal of the 1870 impeachment provision with regard to the judiciary. In *Cusack v. Howlett*,<sup>28</sup> the Illinois Supreme Court ruled that an implied repeal had taken place.<sup>29</sup> They held that the power to remove judges had been taken from the legislative branch and placed solely within the judicial branch in 1964 with the creation of the Commission.<sup>30</sup>

### C. THE 1970 PROVISIONS

The 1970 Constitution clarified the relationship between the judicial discipline structure and the impeachment process, and it also made large-scale changes in the 1964 discipline system.<sup>31</sup> Section 14 of Article IV reasserted the House of Representatives' power to conduct investigations pursuant to its ability to impeach all important executive and judicial officers.<sup>32</sup> The specific inclusion of judicial officers as subject to impeachment was intended to override the Illinois Supreme Court's decision in *Cusak v. Howlett*.<sup>33</sup> Impeachments are tried before the Senate and conviction requires a two-thirds vote of all Senators.<sup>34</sup>

The judicial discipline process was changed from a one-tier system, included within the judicial branch, to a two-tier system independent of the judicial branch. The new two-tier system includes the Illinois State Judicial Inquiry Board and the Illinois Courts Commission.<sup>35</sup>

Frank Greenberg, a member of the first Board convened, identified two factors that motivated the 1970 remodeling of the judicial discipline system.<sup>36</sup> First, he described the turmoil in 1969 surrounding

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28. 44 Ill. 2d 233, 254 N.E.2d 506 (1969).

29. *Id.* at 243-44, 254 N.E.2d at 511-12. For a discussion of this controversy, see D. Miller, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 36-37 (3d ed. 1987); BRADEN & COHN, *supra* note 15, at 374-75.

30. *Cusack*, 44 Ill. 2d at 240-44, 254 N.E.2d at 509-12.

31. For an overview of the events leading up to the creation of the 1970 Constitution and its provisions, see L. PELEKODAS, THE ILLINOIS CONSTITUTION: FINAL REPORT AND BACKGROUND PAPERS, ASSEMBLY ON THE ILLINOIS CONSTITUTION (1962); E. GERTZ & J. PISCIOTTE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1980).

32. ILL. CONST. art. IV, § 14. See also D. Miller, *supra* note 29, at 36-37.

33. See *supra* notes 29-30 and accompanying text.

34. ILL. CONST. art. IV, § 14.

35. ILL. CONST. art. VI, § 15. For an overview of the new discipline system see D. ROLEWICK, A SHORT HISTORY OF THE ILLINOIS JUDICIAL SYSTEM 30-31 (1976). See also notes 3-4 and accompanying text.

36. Greenberg, *supra* note 6, at 71-73.

charges of misconduct brought against the sitting Chief Justice of the Illinois Supreme Court and an Associate Justice of that court.<sup>37</sup> These charges led to the creation of an ad hoc commission to investigate the complaints, since the regular commission was viewed as too closely tied to the justices who were the subjects of the complaints.<sup>38</sup> According to Greenberg, the need for the special commission highlighted the problems of a judicial discipline system contained within the judicial branch and led to a loss of public confidence in the existing system.<sup>39</sup> The second factor contributing to the momentum toward changing the 1964 system was what Greenberg described as the state bar's "pervasive dissatisfaction" with the 1964 system.<sup>40</sup> That dissatisfaction included the feeling that the Commission was ineffective partially because it was convened only by order of the Illinois Supreme Court.<sup>41</sup>

The Board is the investigatory and prosecutorial arm of the discipline system created by the 1970 Constitution.<sup>42</sup> It is composed of two circuit court judges chosen by the supreme court, and four laypersons and three lawyers appointed by the governor. The nine members of the Board serve four-year terms, and they are limited to serving a total of eight years. The Board is permanently convened, and it has the authority to receive or initiate complaints against judges and to conduct investigations into those complaints.<sup>43</sup> If five members decide a complaint has merit, the Board may file a formal complaint with the Commission.

The Commission has five members including: one Illinois Supreme Court Justice chosen by that court, two appellate court judges chosen by the appellate court, and two circuit court judges selected by the Illinois Supreme Court.<sup>44</sup> Like the Board, the Commission is convened permanently. After notice and a hearing, the Commission can reprimand, censure, suspend without pay, or remove any judge found to have engaged in willful misconduct in office, persistently failed to perform his/her duties, or engaged in conduct "prejudicial to the administration of justice or that brings the judicial office into

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37. *Id.* at 71.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 72.

42. The Board's composition and powers are covered in ILL. CONST. art. VI, § 15 (b) and (c).

43. ILL. CONST. art VI, § 15(c).

44. The composition and authority of the Commission is set out in ILL. CONST. art. VI, § 15(e)-(g) of the 1970 Constitution.



disrepute. . . ."<sup>45</sup> If the Commission determines that a judge is no longer physically or mentally able to perform, it may either suspend without pay or retire the judge.<sup>46</sup>

Three members of the Commission must agree on a particular decision.<sup>47</sup> The constitution explicitly states that decisions of the Commission are final.<sup>48</sup>

Most differences of opinion about the performance of the two-tiered system created in 1970 relate to one of the three issues raised in the *Harrod* case referred to above.<sup>49</sup> They include disagreement over: (1) the authority of the Illinois Supreme Court to consider allegations that either the Board or the Commission has acted beyond its authority under the Constitution; (2) the standards to be used in determining whether there has been actionable judicial misconduct; and (3) the authority of the Board and Commission when the alleged misconduct involves the interpretation of an arguably unclear statute.

## II. *Harrod v. Illinois Courts Commission*<sup>50</sup>

### A. THE *HARROD* DECISION

On December 3, 1976, the Commission ordered Judge Samuel Harrod III of the Eleventh Circuit Court suspended from his duties for one month, without pay.<sup>51</sup> The Commission was acting on a formal complaint filed with it by the Board charging Judge Harrod with "willful misconduct in office, conduct prejudicial to the administration of justice, and conduct that brought the judicial office into disrepute."<sup>52</sup>

The Board alleged that the judge repeatedly violated Illinois Supreme Court Rule 61 (c)(18) which requires that, when sentencing, a judge follow the law and not impose sentences which are not authorized by law.<sup>53</sup> In a series of cases, Judge Harrod imposed sentences which included requirements that: (1) 26 male defendants

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45. ILL. CONST. art. VI, § 15(e)(1).

46. ILL. CONST. art. VI, § 15(e)(2).

47. ILL. CONST. art. VI, § 15(f).

48. ILL. CONST. art. VI, § 15(f).

49. See *supra* notes 10-13 and accompanying text.

50. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

51. *Id.* at 451, 372 N.E.2d at 55-56.

52. *Id.* at 452, 372 N.E.2d at 56.

53. ILL. SUP. CT. R. 61(c)(18). The Illinois Constitution gives the Illinois Supreme Court the authority to adopt rules of conduct for state judges. ILL. CONST. art. VI, § 13(a).

have their hair cut; (2) 15 probationers leave their drivers' licenses in the custody of the court clerk in return for cards identifying them as on probation; and (3) three defendants convicted of illegally transporting alcohol collect cans and bottles along highways.<sup>54</sup> In addition, the judge had refused to grant bail to one defendant charged with driving while intoxicated. Harrod did so on the grounds that, when arrested, the defendant was out on bail awaiting trial on two other counts of the same offense.<sup>55</sup>

In his response to the Board's complaint, Judge Harrod argued that his creative sentencing was within his judicial discretion under state statute.<sup>56</sup> That statute states:

(a) The conditions of probation and of conditional discharge shall be that the person:

(1) not violate any criminal statute. . .; and

(2) make a report to and appear in person before such person or agency as directed by the court.

(b) The Court may *in addition to other conditions* require that the person:

[10 permissible conditions are given].<sup>57</sup>

According to Judge Harrod, the sentences referred to in the Board's complaint were within his interpretation of the statute's phrase "in addition to other conditions". Specification of these other conditions, he argued, was left to the discretion of the sentencing judge. Furthermore, he pointed out that this particular statute had yet to be interpreted by an appellate court which was the body with the authority to review his interpretation.<sup>58</sup>

With regard to the case in which he had denied bail, Harrod cited supporting precedent.<sup>59</sup> Based on these two premises, Harrod argued that his actions were reviewable through the regular appellate process and were not within the authority of either the Board or the Commission.<sup>60</sup>

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54. *Harrod*, 69 Ill. 2d at 452-53, 372 N.E.2d at 56.

55. *Id.* at 453, 372 N.E.2d at 56.

56. *Id.* at 453-54, 372 N.E.2d at 57.

57. ILL. REV. STAT. ch. 38, para. 1005-6-3 (1973) (emphasis added).

58. *Harrod*, 69 Ill. 2d 445, 453-54, 372 N.E.2d 53, 57 (1977). An appeal of one of Judge Harrod's haircut sentences was pending before the Court of Appeals. See *People v. Dunn*, 43 Ill. App. 3d 94, 356 N.E.2d 1137 (1976).

59. *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74 (1975) cited in *Harrod*, 69 Ill. 2d at 454, 372 N.E.2d at 57.

60. *Harrod*, 69 Ill. 445, 454, 372 N.E.2d 53, 57 (1977).



The Board responded that Article VI, section 15 of the 1970 Constitution gave both the Board and Commission the authority to examine any judicial authority to examine any judicial conduct which might, in their interpretation:

- [1] represent "willful misconduct in office,"
- [2] be "prejudicial to the administration of justice," or,
- [3] bring "the judicial office into disrepute."<sup>61</sup>

In the Board's view, Harrod's sentencing behavior fit all three descriptions of misconduct. It offered two possible constructions of the sentencing statute, both at odds with the one presented by Judge Harrod.<sup>62</sup> The Board found that the "other conditions" referred to in the statute were the two conditions listed in the statute's preceding paragraph, not conditions beyond those enumerated in the statute.<sup>63</sup> Alternatively, the other conditions could be ones not enumerated but of a type similar to those listed.<sup>64</sup> Under either construction, the Board found Harrod's sentences beyond the authority of the statute.<sup>65</sup> In addition, the Board argued that the appealability of these sentences was not relevant to the question of whether they also constituted grounds for judicial discipline.<sup>66</sup>

After a hearing, the Commission agreed with the Board's conclusions that (1) the fact that the sentence could be appealed was irrelevant; and (2) they had the authority to act whenever judicial conduct met the three constitutional conditions cited by the Board.<sup>67</sup> The Commission, however, dismissed the part of the complaint dealing with the denial of bail and also disagreed with the Board's interpretation of the statute, offering yet another interpretation. The Commission's interpretation was a modification of the Board's second alternative. The "other conditions" permitted were those which were: (1) of a type similar to those enumerated; (2) "directed toward rehabilitation;" (3) "reasonably related" to the offense for which the defendant was being sentenced; and (4) "not unduly restrictive of personal liberties".<sup>68</sup> The Commission offered this interpretation de-

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61. See ILL. CONST. art. VI, § 15(c) for the authority of the board; ILL. CONST. art. VI, § 15(e) for that of the Commission.

62. *Harrod*, 69 Ill. 2d 445, 455, 372 N.E.2d 53, 57 (1977).

63. *Id.* at 455, 372 N.E.2d at 57.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 456, 372 N.E.2d at 58. See *supra* notes 45-46 and accompanying text for discussion of the constitutional conditions.

68. *Harrod*, 69 Ill. 2d 445, 456, 372 N.E.2d 53, 58 (1977).

spite the fact that, during the time between the Board's ruling and the Commission's ruling, an appellate court had ruled only that the other conditions had to be related to the defendant's crime.<sup>69</sup>

Based on its construction of the statute, the Commission dismissed the charges involving those defendants ordered to pick up bottles and cans.<sup>70</sup> However, it held that the sentences involving the haircut orders and confiscation of drivers' licenses were without legal authority and, therefore, constituted judicial misconduct meriting discipline.<sup>71</sup> Judge Harrod was suspended from office, without pay, for one month.<sup>72</sup>

Ten days after the Commission filed its final order, Judge Harrod requested a rehearing and a stay pending that rehearing. Both requests were denied. Judge Harrod then petitioned the Illinois Supreme Court for permission to file for a writ of *mandamus* ordering the Commission to expunge his record. That petition was granted.<sup>73</sup>

The first point addressed by the Supreme Court in acting on Judge Harrod's petition was its jurisdiction to do so. The Board and Commission argued that the Commission's order was not reviewable because section 15(f) of article VI of the 1970 Constitution states: "The decision of the Commission shall be final."<sup>74</sup> While the court agreed that it lacked the power to review the Commission's decision on the evidence in a case, it ruled that it did have the authority to question whether the Commission had exceeded its constitutional authority.<sup>75</sup> The Court found this power in a series of provisions in the state constitution which combine to make that court "the final arbiter of the Constitution".<sup>76</sup>

The second point addressed by the court in *Harrod* involved the question of which standards are to be used by the Board and Commission when assessing judicial conduct. The Board's position was that it had the authority to examine conduct which may violate either the Standards of Judicial Conduct created by the Illinois Supreme

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69. *People v. Dunn*, 43 Ill. App. 3d 94, 96, 356 N.E.2d 1137, 1138 (1976).

70. *Harrod*, 69 Ill. 2d 445, 456, 372 N.E.2d at 58.

71. *Id.* at 456-7, 372 N.E.2d at 58.

72. *Id.* at 456-57, 372 N.E.2d at 58 (1977). One member of the Commission dissented on the grounds that they did not have jurisdiction since the sentences were within Harrod's judicial discretion. *Id.* at 457.

73. *Id.* at 474, 372 N.E.2d at 66.

74. *Id.* at 457, 372 N.E.2d at 58.

75. *Id.* at 457-58, 372 N.E.2d at 58-59.

76. *Id.* Three constitutional provisions were relied on: the separation of powers provision, ILL. CONST. art. II, § 1; and the provisions specifying the court's judicial authority and jurisdiction, ILL. CONST. art. VI, §§ 1 and 4, respectively.



Court or the standards determined by the Board to fall within the Constitution's reference to willful misconduct, prejudicial or disreputable conduct.<sup>77</sup>

The court rejected the Board's argument. The Judicial Article of the 1970 Constitution gives the supreme court the authority to set rules of conduct for state judges.<sup>78</sup> According to the court, the framers of that article intended for those standards to be the exclusive basis for the operation of the disciplinary system created in section 15.<sup>79</sup> The court said that the language in article VI, section 15 about willful misconduct and prejudicial or disreputable conduct was not intended to provide the Board or Commission with the authority to create their own standards of judicial conduct independent of those established by the court.<sup>80</sup> Instead, that language was intended to guide the Board and Commission in deciding whether a judge's violation of one of the supreme court's rules was more than "a technical violation", and thus, justification for discipline.<sup>81</sup> In addition, the terms used in the constitutional provisions regarding willful misconduct are so broad that, as standards for judicial conduct, they would be subject to attack as overly broad.<sup>82</sup> Therefore, only conduct violative of the Supreme Court's Standards for Judicial Conduct can provide grounds for Board or Commission action.<sup>83</sup>

The third point made by the court in the *Harrod* case dealt with the question of what the Board and Commission were to do with allegations of judicial misconduct predicated on an interpretation of an arguably unclear statute which had yet to be clarified by an appellate court.<sup>84</sup> The court rejected the contention that because a judge's action was appealable, it was beyond the jurisdiction of the judicial discipline system. However, they agreed with Judge Harrod, "that to maintain an independent judiciary mere errors of law or simple abuses of judicial discretion should not be the subject of discipline. . . ."<sup>85</sup> Nonetheless, the court stated that judicial discretion has limits. One of these limits is the supreme court rule prohibiting

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77. *Id.* at 463, 372 N.E.2d at 61. The constitutional language referred to by the Board is found in ILL. CONST. art. VI, § 15 (c).

78. ILL. CONST. art VI, § 13(a).

79. *Harrod*, 69 Ill. 2d 445, 463-70, 372 N.E.2d at 61-64.

80. *Id.* at 468, 372 N.E.2d at 63.

81. *Id.* at 468, 372 N.E.2d at 63-64.

82. *Id.* at 469, 372 N.E.2d at 64.

83. *Id.*

84. *Id.* at 471-73, 372 N.E.2d at 65-66.

85. *Id.* at 471, 372 N.E.2d at 65.

sentences not authorized by law.<sup>86</sup> Therefore, "where the law is clear on its face," a judge who repeatedly issues sentences not authorized by law can be brought before the judicial discipline system.<sup>87</sup>

Since the Board had charged Harrod with a violation of a relevant supreme court rule, the Board was within its authority.<sup>88</sup> However, that authority does not extend to the interpretation of "statutory ambiguities."<sup>89</sup> Such interpretations are solely within the power of the judicial branch.<sup>90</sup> The court pointed out that, if the Board or Commission could interpret an unclear statute and discipline a judge for acting contrary to its interpretation, and if an appellate court had issued a different interpretation of the same statute, then the judge would be in a no-win situation. Any action taken would subject that judge to either reversal on appeal or to judicial discipline.<sup>91</sup> In a concluding paragraph, the court summarized its ruling:

The function of the Commission is one of fact finding. Its function in this case was to apply the facts to the *determined* law, not to determine, construe, or interpret what the law should be. We find that the Commission exceeded its constitutional authority when, in determining whether [Judge Harrod's] orders were without authority of law, it applied its own independent interpretation and construction of [the statute]. . . .<sup>92</sup>

The Supreme Court granted Judge Harrod's petition for *mandamus*, declared his suspension void, and ordered the Commission to expunge it from the records.<sup>93</sup>

#### B. THE IMPACT OF THE *HARROD* DECISION

The response to the court's opinion in *Harrod* was mixed. Fred Greenberg, then a member of the Board, wrote the major critique of the opinion and charged that the court had unconstitutionally deprived the Board and Commission of their independence from the judiciary.<sup>94</sup> Taking a different perspective, Francis Morrissey wrote supporting

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86. See *supra* notes 53-57 and accompanying text.

87. *Harrod*, 69 Ill. 2d 445, 472, 372 N.E.2d at 65.

88. *Id.* at 470, 372 N.E.2d at 64.

89. *Id.* at 473, 372 N.E.2d at 65-66.

90. *Id.* at 473, 372 N.E.2d at 65-66.

91. *Id.* at 473, 372 N.E.2d at 66.

92. *Id.* at 473, 372 N.E.2d at 66 (emphasis in original).

93. *Id.* at 474, 372 N.E.2d at 66.

94. See generally Greenberg, *supra* note 6.



the court's decision.<sup>95</sup> Morrissey had participated in preparing the amicus brief the Illinois Judges Association filed in the *Harrod* case. The decision was commented on by two Michigan scholars who used the issues raised in *Harrod* as the basis for their argument that the Illinois system is inherently flawed.<sup>96</sup>

Before examining the commentators' contrasting perceptions of the *Harrod* decision and the conclusions that can be drawn from them, it is important to note the difficulty of objectively assessing the performance of any system of judicial discipline. The difficulty lies in the nature of the problem the systems are created to solve. That problem, judicial misconduct, is similar to other forms of deviant behavior in its resistance to objective measurement. Before the amount of judicial misconduct in a system can be measured, judicial misconduct itself must be defined. The *Harrod* case provides an example of the difficulty of reaching agreement on such a definition. The Board saw Judge Harrod's haircut, drivers' license, and bottle-and-can sentences as judicial misconduct. They also saw the denial of bail decision as misconduct.<sup>97</sup> The Commission saw only the haircut and drivers' license sentences as misconduct.<sup>98</sup> The Illinois Supreme Court, and presumably Judge Harrod, saw none of the sentences as misconduct.<sup>99</sup>

Even if some consensus on the definition of judicial misconduct could be reached, measurement difficulties would remain.<sup>100</sup> Since misconduct can be the subject of punishment, or at least social and professional stigmatization, judges are not likely to openly admit to it. Perceptions of members of the bar and judiciary regarding the amount of judicial misconduct tend to be unreliable, because these perceptions are influenced by personal grudges, partisan and ideological differences, differences of opinion about specific cases, and unsubstantiated anecdotes. Official records of disciplinary commissions may also be an unreliable measure, reflecting the efficiency of a commission rather than the extent of the problem.

Given these difficulties in assessing how much judicial misconduct plagues Illinois, predictions about the impact *Harrod* will have on the

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95. See Morrissey, *The Illinois Courts Commission and Judicial Independence: Judicial Disciplinary Proceedings in the Wake of Harrod*, 59 CHI. B. REC. 188 (1978).

96. See Gillis & Fieldman, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach*, 54 CHI.[-]KENT L. REV. 117 (1977); cf. R. Cohn, *Comparing One- and Two-tier Systems*, 63 JUDICATURE 244 (1979).

97. See *supra* notes 53-56 and accompanying text.

98. See *supra* notes 68-72 and accompanying text.

99. See *supra* notes 57-60 & 84-92 and accompanying text.

100. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.[-]KENT L. REV. 1 (1977).

effectiveness of the Board and Commission must be viewed as speculative. Similarly, one needs to approach with caution the question of whether the discipline section of the Judicial Article of the 1970 Illinois Constitution should be amended in response to *Harrod*. Consideration of this question will be divided into three parts reflecting the three issues raised and decided in *Harrod*.

### 1. *The Final Authority*

In *Harrod*, the Illinois Supreme Court ruled that it had the constitutional obligation to address the question of whether either the Commission or the Board had exceeded its authority under the Judicial Article.<sup>101</sup> Such a power is part of the court's role as the final arbiter of the state constitution. That role includes the responsibility to consider whether any organ of state government has acted *ultra vires*. Section 15(f) of the judicial discipline section of the constitution states: "The decision of the Commission shall be final".<sup>102</sup> The court did not view this provision as prohibiting any judicial examination of Commission action. Rather, that section was viewed as prohibiting judicial review of the evidence used by the Board and Commission and the substance of the rulings they made on that evidence.

On the other hand, the Board, the Commission, and Frank Greenberg argued that section 15(f) clearly prohibits *any* judicial examination of the rulings of the Commission. Greenberg criticized the court's ruling on this point as "judicial review in the guise of policing constitutional boundaries," and a "means of constitutional policymaking or 'amending' the constitution."<sup>103</sup> He viewed the effect of this behavior as "the reassertion by the supreme court of judicial control over the system."<sup>104</sup> Such control, according to Greenberg, led to the problems with the one-tier system created by the 1964 amendment which produced wide-spread dissatisfaction among the bar and a loss of public confidence in that system.<sup>105</sup>

In describing the evolution of the current Illinois system, Greenberg observed that partisan involvement in judicial elections made it especially important that the judicial discipline system be totally independent of the state judiciary.<sup>106</sup> He therefore finds the supreme court's assertion of the power to review questions regarding the scope of the Board's and Commission's authority troubling.

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101. *Harrod*, 69 Ill. 2d 445, 457-58, 372 N.E.2d 53, 58-59 (1977).

102. ILL. CONST. art. VI, § 15(f).

103. Greenberg, *supra* note 6, at 106.

104. *Id.* at 105.

105. *Id.* at 71.

106. *Id.* at 76-77.



The basis Greenberg gave for his concern implies that the method by which state judges reach office somehow reduces their capacity to act objectively regarding charges of judicial misconduct. However, the members of the Commission are all judges themselves. They have been selected by the same process as have the judges who may come before them on charges of misconduct and those on the supreme court. The judges sitting on the Commission are appointed to those seats by other judges. It is difficult to understand why the supreme court's exercise of the power to review questions about the scope of the Commission's authority contaminates the integrity or independence of a system of judicial discipline already comprised of members of the judicial branch.

If there were a compelling need to keep the judicial discipline system *totally* independent of the state judiciary, it would be reasonable to advocate an amendment to the Judicial Article clarifying section 15(f) and overruling the *Harrod* decision on this point. Yet, even if the need for this independence were conceded, such an amendment might create a different problem. If the supreme court had no authority to rule on whether the Board or the Commission exceeded their authority under the constitution, what checks would there be on the Board's and Commission's behavior? If they became the sole interpreters of their constitutional mandate, to whom would they be accountable should they exceed that mandate?

The only apparent checks on their behavior would be the possibility of further constitutional amendment or the opportunity to defeat judges sitting on the Commission at their next judicial election.<sup>107</sup> These are the same checks available now to limit potential supreme court abuses of authority. Hence, the controversy over the supreme court's authority to review the scope of the Commission's authority can be reduced to a question of whom should be left relatively unaccountable—the Illinois Supreme Court or the Commission.

## 2. *Standards of Judicial Conduct*

In *Harrod*, the supreme court ruled that Section 13 of the 1970 Judicial Article gave them exclusive authority to adopt rules of

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107. Since members of the Commission are selected by their colleagues on their respective courts, it is possible that they could be removed by those colleagues for exceeding their authority. However, such a possibility is not mentioned in the Judicial Article, and therefore probably would require a decision of the supreme court to ensure its legitimacy. Such a possibility is not much of an alternative to judicial review as a check on Commission power since its use would lead right back to the question of the supreme court's authority to interpret § 15.

conduct governing the judiciary.<sup>108</sup> Neither the Board nor the Commission could develop independent standards for use in judicial misconduct cases.

The opposite position was taken by the Board and Commission in *Harrod*.<sup>109</sup> Greenberg supported the view of the Commission and the Board, calling the court's decision "unworkable and an invasion of the independence of the judicial discipline system".<sup>110</sup> He argued that the information available on the deliberations of the drafters of the 1970 Judicial Article showed no evidence that they intended the rules created by the supreme court under Section 13<sup>111</sup> to be the *only* rules of conduct applicable. According to Greenberg, if that had been their intent, there would have been no need for the listing of criteria in section 15. That section lists reasons (i.e., willful misconduct, and prejudicial or disreputable conduct) the Commission may use to invoke available sanctions for judicial misconduct. In *Harrod*, the Board and Commission used the criteria as bases for their actions.

This second issue seems to be somewhat of a tempest in a teapot. Perhaps it is an extension of the battle for "territory" that lies at the heart of the reviewability issue. The scope of the supreme court's rules under Section 13 is sufficiently broad to include most incidents of even the more innovative forms of judicial misconduct. The Board and Commission had no trouble tying Judge Harrod's behavior to a section of the court rules. Their additional insistence that he violated the criteria in Section 15 added nothing of substance to their accusations, since the way in which they alleged he violated the Section 15 requirements was by violating a specific supreme court rule.

Greenberg advocated allowing both the Board and Commission to develop independent standards for judicial conduct through a case-by-case definition of the content of the criteria in Section 15.<sup>112</sup> In *Harrod*, the court observed that given the general nature of the Section 15 provisions, such an approach would be vulnerable to attack for being sufficiently vague as to deprive judges of notice of the standards to which they are held.<sup>113</sup> Additionally, under Greenberg's approach, the Board and Commission would be granted total immunity from judicial review and free to define the content of the provisions in Section 15. The Board and Commission would thus

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108. *Harrod*, 69 Ill. 2d 445, 462-64, 372 N.E.2d 53, 61 (1977).

109. *Id.* at 463, 372 N.E.2d at 61.

110. Greenberg, *supra* note 6, at 110.

111. ILL. CONST. art. VI, § 13.

112. Greenberg, *supra* note 6, at 86-88.

113. *Harrod*, 69 Ill. 2d 445, 468-69, 372 N.E.2d 53, 64 (1977).



become the final arbiters of judicial misconduct, free to expand or reject the supreme court rules which are authorized by the constitution.

### 3. *Judicial Discipline and Statutory Interpretation*

The third issue dealt with in the *Harrod* decision seems the most vexing and the one most in need of some constitutional modification. That issue involves the authority of the Board and Commission when alleged judicial misconduct involves an ambiguous statute not yet interpreted by an appellate court.

Judge Harrod asserted that the creative sentences he imposed which led to the Board's complaint were within the discretion granted him by the state statute. That statute, defining the conditions judges can impose on probationers, included a variety of specific conditions and the phrase "in addition to other conditions".<sup>114</sup> Judge Harrod saw the sentences as permissible "other conditions". An appeal, involving the question of whether the statute authorized these exercises in judicial ingenuity, was pending before the state court of appeals at the time of the Board's and Commission's actions.<sup>115</sup> Both the Board and Commission issued their own interpretations of the statute. The appellate court eventually issued an opinion containing an interpretation of the statute which differed from both the Board and Commission interpretations. The supreme court relied on the appellate court interpretation.

The supreme court described the untenable situation that could develop if the Board and Commission were allowed to interpret vague statutes and use these interpretations as the bases for charges of judicial misconduct.<sup>116</sup> Judges could be faced with one interpretation coming from higher courts in the judiciary and a different interpretation coming from the judicial discipline bodies. A judge would have the choice of acting in accord with the disciplinary bodies' interpretation and having his/her decision over-turned on appeal, or acting in accord with the appellate court interpretation and being open to charges of judicial misconduct. The *Harrod* decision prevents that dilemma from developing by prohibiting the commission from applying its own interpretation.<sup>117</sup>

Francis Morrissey noted that after the Board filed its complaint against Judge Harrod, a number of state trial judges, who had been

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114. ILL. REV. STAT. ch. 38, para. 1005-6-3(b) (1973).

115. *People v. Dunn*, 43 Ill. App. 3d 94, 356 N.E.2d 1137 (1876).

116. *Harrod*, 69 Ill. 2d 445, 473, 372 N.E.2d 53, 66 (1977).

117. *Id.* at 472, 372 N.E.2d 65.

interpreting the statute as Judge Harrod had, changed their sentencing behavior and limited themselves to the conditions enumerated in the statute.<sup>118</sup> He argued that this chilling of judicial discretion ran counter to the intent of the legislature in drafting the statute.

The problem raised by this third issue is not so much with what the court decided, but rather more with finding out precisely when this part of the *Harrod* decision applies in future cases.

It is settled by *Harrod* that the Board and Commission cannot interpret vague statutes and use their interpretations as bases for charges. That seems to imply that if a complaint about judicial conduct is received and it involves such a statute, both the Board and the Commission must wait for appellate interpretation before proceeding with the complaint. Given the case loads of higher courts in Illinois, the wait could be considerable. Meanwhile, the Commission would be unable to protect the public from a judge engaging in such conduct. Further, some question exists about when it is safe to assume that the appellate process has run its course. For example, *Harrod* involved a statute interpreted by the court of appeals. In a future case, perhaps with a closely divided appellate court, would the Board and Commission be able to act when the court of appeals issued its interpretation, or would they have to wait to see if the supreme court chose to consider the matter? If the case raised federal questions, would the Board and Commission need to wait for possible United States Supreme Court action?

Perhaps a thornier aspect of this problem is the determination of when a statute is sufficiently vague to bring the *Harrod* rule into effect. John Gillis and Elaine Fieldman argue that the difficulty of separating issues of legal interpretation from issues of judicial discipline is a primary weakness of the Illinois system.<sup>119</sup> They argue that this overlap will occur with sufficient frequency so that conflict is inevitable in a judicial discipline system like Illinois' which prohibits the supreme court from making determinations on the merits of complaints.

Statutes are not the only potential source of this sort of conflict. Constitutions also require interpretation. Following *Harrod*, questions arose about the extent to which judges charged with judicial misconduct are protected by procedural and substantive guarantees in the constitution. For example, the case of Judge Elward<sup>120</sup> involved the

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118. Morrissey, *supra* note 95, at 197.

119. Gillis & Fieldman, *supra* note 96, at 130.

120. *In re Elward*, 1 Ill. Cts. Com. 114 (No. 77-CC-1 1977).



question of whether his right of free speech prohibited charging him with judicial misconduct based on allegedly misleading campaign advertisements.<sup>121</sup> The Board found no constitutional bar and filed a formal complaint with the Commission. The Commission held that Judge Elward's advertisement was protected speech.<sup>122</sup>

### III. CONCLUSION

Given the segregation of Illinois' Supreme Court from the judicial discipline system, such questions of interpretation are likely to provoke future controversy even if the Board, the Commission, and the Illinois Supreme Court put a great deal of effort into avoiding unnecessary conflict. Their history of interaction leaves little room for optimism on that score. One means of avoiding a future filled with ongoing battles would be a constitutional amendment creating and legitimizing a process by which the Board and/or Commission could request the equivalent of a supreme court advisory opinion when a complaint of judicial misconduct rests on the interpretation of an unclear statute or a constitutional question. It may be best to include a provision to settle this controversy in any amendment which may be proposed on the topic of judicial selection, since many of the sources of concern related to concerns raised by the current selection and retention articles of the 1970 Constitution. For example, much of the concern expressed by Greenberg centers on the impact election-related partisanship may have on the integrity of the judicial discipline system.<sup>123</sup> The issue in *Elward* concerned judicial ethics in campaigns and is an area where the Illinois Supreme Court and the Board and Commission are likely to clash in the future. All three issues raised by *Harrod* are tied closely to concerns about selection and retention. In fact, the three issues may be surrogates for concerns about the ethical complications created by the partisan election of state judges. Therefore, focusing reformist attention on modification of the selection and retention provisions of the 1970 Constitution may be more productive in the

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121. Judge Elward's lawyers in his judicial discipline case have written an article supportive of the contention that the constitutional right of freedom of speech gives judicial candidates a great deal of discretion in choosing the content of their campaign advertisements: D. Reuben and L. Ring, *Judges Have Rights, Too*, 59 CHI. B. REC. 220 (1978). Rubin Cohn, a member of the Judicial Inquiry Board filing the complaint against Judge Elward delivered an intense critique of the Commission's decision in *Judicial Discipline in Illinois - A Commentary on the Judge Elward Decision*, 59 CHI. B. REC. 200 (1978).

122. *Judges Have Rights, Too*, 59 CHI. B. REC. 220, 222 (1978).

123. Greenberg, *supra* note 6.

long term than merely modifying the judicial discipline article in response to the issues raised in *Harrod*. If the concerns raised by judicial partisanship were removed, the Illinois Supreme Court and the disciplinary Board and Commission may be able to evolve a mutually acceptable interpretation of those sections of the judicial discipline article which are now the source of controversy.



# Limits on State Taxation and Spending: Implications for the Illinois Constitutional Convention Referendum

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Voters in Illinois will be asked in 1988 if a constitutional convention should be convened to review the state constitution approved in 1970. If a constitutional convention is mandated by the voters, one issue that seems sure to arise is the possibility of establishing limits on the taxing and spending activities of state government. In the last half of the decade of the 1970's and in the early 1980's, eight states approved some type of state-level limitation measure.<sup>1</sup> Illinois, however, was not among this group. Recently two additional states adopted limitation measures, while two other states allowed their limitations to lapse. There is still considerable interest in some quarters in using this approach to control the size of state government.

In this paper, the role of state-level taxation and expenditure limitation measures will be reviewed and analyzed. The constitutional function of providing fiscal discipline to governments will be addressed in general terms first. Then, a system will be established to classify

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1. The following states approved general limitations on the maximum amount of revenue the state could collect: Mississippi, Missouri, Nebraska and Washington. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1985-86 EDITION 146-47 (1986) [hereinafter SIGNIFICANT FEATURES].

The following states approved general limitations on the maximum amount the state may spend or appropriate (usually allowing for an annual percentage increase in operating expenses): Arizona, California, Colorado, Kansas, Minnesota and New Jersey. See *id.*

the various features of relatively new measures that explicitly limit the size of state government by restricting tax or spending levels. Next, the theoretical arguments for and against the use of explicit limits will be discussed. The experience of other states will then be reviewed. Finally, implications of possible limitation measures on Illinois government will be discussed.

### I. CONSTITUTIONS AND FISCAL DISCIPLINE

Constitutions serve the dual role of providing the process for making decisions and establishing constraints that limit the substantive outcomes of the decision-making process.<sup>2</sup> Limiting the range of possible outcomes of the fiscal decision-making process can help provide a stable economic environment that promotes economic growth. It can limit the impact of rent-seeking activities by participants in the political system who attempt to use the government's redistributive powers to further their own interests. It can prevent every issue from being debated every year. On the negative side, however, these same stabilizing attributes may unduly limit the range of options in periods where dramatic change is desired.

Almost every state has a variety of constitutional measures intended to provide fiscal discipline to the governor and legislature as well as to local governments.<sup>3</sup> For example, forty-nine states have a balanced budget requirement<sup>4</sup> and forty-three provide the governor

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2. See J. FRED GIERTZ, *THE PUBLIC FINANCE ARTICLES OF THE 1970 ILLINOIS CONSTITUTION*, (Illinois Commission on Intergovernmental Cooperation, 1987).

3. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *FISCAL DISCIPLINE IN THE FEDERAL SYSTEM: NATIONAL REFORM AND THE EXPERIENCE OF THE STATES* 38 (1987) (Table 2).

4. *Id.* The only state currently without a balanced budget requirement is Vermont. While the Vermont governor is required, by statute, to make recommendations on how to alleviate prior deficits, there is no requirement that the governor submit a balanced budget. *Id.* at 40-41.

The following states have statutorily balanced budget requirements: Alaska, Arkansas, Connecticut, Florida, Hawaii, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Virginia and Washington. The following states have constitutional balanced budget requirements (note that 15 of the 20 states with statutory balanced budget provisions also have some constitutional provision): Alaska, Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *Id.* at 40 (Table 3).



with line item veto authority.<sup>5</sup> More than half the states have constitutional restrictions on debt.<sup>6</sup> For the most part, these are long-standing provisions that have been in place for many decades.

States also constrain the taxing powers and, to a lesser extent, the spending activities of local governments. Specific property tax rate limits for individual local governments are in place in thirty-one states,<sup>7</sup> while twelve states have limits on the combined property tax rate.<sup>8</sup> Property tax levy limits have been adopted in twenty-one states.<sup>9</sup> In most cases, these limits can be exceeded with voter approval through the referendum process.<sup>10</sup>

In Illinois, the 1970 Constitution requires that the governor submit a balanced budget each year and that appropriations by the General Assembly not exceed the funds expected to be available for the year.<sup>11</sup> In addition, the governor has both line item and reduction veto powers on appropriation bills in Illinois.<sup>12</sup> Unlike most other states, Illinois places constitutional limits on the level of income tax.<sup>13</sup> Both the individual and corporate income tax must have non-graduated rates and the ratio of the corporate tax rate to the individual tax

5. Those states include: Alaska, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *Id.* at 38 (Table 2).

6. Constitutional debt restrictions are imposed in: Alaska, Alabama, Arizona, California, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *Id.* at 38 (Table 2).

7. Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming. *See* SIGNIFICANT FEATURES, *supra* note 1, at 146-47.

8. Alabama, Alaska, California, Florida, Kentucky, Michigan, Nevada, New Mexico, Ohio, Oklahoma, Washington and West Virginia. *See id.*

9. Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island and Washington. *See id.*

10. *Id.*

11. ILL. CONST. art. VIII, § 2(a).

12. ILL. CONST. art. IV, § 9(d).

13. ILL. CONST. art. IX, § 3.

rate cannot exceed 8:5.<sup>14</sup> Accordingly, the corporate rate cannot exceed the individual rate by more than sixty percent.

The Illinois Constitution also gives state government the power to place fiscal limits on local governments.<sup>15</sup> Local taxes, like state taxes, must comply with the constitutional requirements of uniformity and the prohibition of a graduated income tax. Non-home rule local governments have access only to taxes authorized by the state since these governments "have only the power granted them by law."<sup>16</sup> Home rule units are also subject to limits set by the state. Therefore, the state can effectively ban certain taxes, such as the income tax, by not providing authorizing legislation and can set rate limitations on other taxes, such as the property tax and local sales taxes, through legislative initiative.<sup>17</sup>

These traditional fiscal discipline measures imposed on, or available to, state governments seem to have provided a considerable degree of stability to both Illinois and to the other states in the union. States in general have, unlike the federal government, avoided long term deficits by either controlling spending or by raising taxes to provide funds for desired activities. This has been true historically and continues to be true today. Yet these measures seemed to do little to retard the growth of state governments before the 1980's.

## II. STATE LEVEL LIMITATION MEASURES: A CLASSIFICATION

As a response to the rapid growth in state and local government in the post-World War II era, many states considered and some approved a variety of measures designed to reduce the size, or at least the rate of growth, of these governments.<sup>18</sup> With the rapid growth of state governmental spending in the early 1970's, even with many of the traditional fiscal disciplinary measures in place, many states went further to adopt more explicit means of limiting the size or the rate of growth of state and local governments.

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14. ILL. CONST. art. IX, § 3(a).

15. ILL. CONST. art. VII, § 6(g).

16. ILL. CONST. art VII, § 7.

17. See GIERTZ, *supra* note 2.

18. For an overview of these measures, see R. BAHL, FINANCING STATE AND LOCAL GOVERNMENT IN THE 1980s 184-88 (1984); R. ARONSON & J. HILLEY, FINANCING STATE AND LOCAL GOVERNMENTS 223-28 (4th ed. 1986). For a more detailed analysis see Note, *Proceeding of a Conference on Taxation and Expenditure Limitation*, 2 NAT. TAX J. 32 (June 1979); R. MUSGRAVE, *Leviathan Cometh - Or Does He?* in TAX AND EXPENDITURE LIMITATIONS (H. Ladd & N. Tideman eds. 1981).



These explicit state tax and expenditure limitation measures should be considered part of the broader category of mechanisms designed to provide fiscal discipline to government decision-makers which range from very modest constraints that are little more than cosmetic (and seldom restrict or modify fiscal behavior) to ones that are an important force in the state budgeting process. After a period of inactivity in the early 1980's, specific tax and expenditure limitation issues have again arisen in several states. With the consideration of a constitutional convention, and the possibility of an acceleration in state spending should there be a major tax increase, state tax and expenditure limitation measures may be the subject of renewed interest in Illinois.<sup>19</sup>

Such specific measures limit state governments in a variety of ways and they may be either constitutional or statutory in nature.<sup>20</sup> In choosing what restraints are suitable to limit the public economy, many states restrict appropriations; either total appropriations, tax revenue appropriations, or general fund appropriations.<sup>21</sup> A smaller number of states restrict revenues; either state tax revenue or total state revenue.<sup>22</sup> Two states limit the governor's general fund appropriation requests.<sup>23</sup>

The mechanics of the limitations take one of three forms regardless of whether revenues or appropriations are the base that is restricted. The first form is a fixed percentage limit (such as seven percent) on the yearly growth in the base of revenues or appropriations. The second form is a variable limit on the yearly growth determined by the change in an exogenous factor or factors such as state personal income, population or inflation. The third form limits appropriations or revenues to a fixed percentage of state personal income.

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19. State government tax and spending limitation measures addressed in this paper should not be confused with local limitations on local governments such as Proposition 13 in California or Proposition 2 1/2 in Massachusetts.

20. Constitutional limits on state government are imposed in: Alaska, Arizona, California, Hawaii, Michigan, Missouri, Tennessee and Texas. Statutory limits on state government are imposed in: Colorado, Idaho, Louisiana, Montana, Nevada, Oregon, Rhode Island, South Carolina, Utah and Washington, See SIGNIFICANT FEATURES, *supra* note 1, at 146-51 (Tables 91 and 92).

21. *Id.* at 148-51 (Table 92).

22. *Id.*

23. *Id.* Nevada and Rhode Island both have non-binding limitations on the Governor's appropriation request (Rhode Island) or expenditures (Nevada). Nevada's formula for growth involves a multiplier formula which incorporates population change and inflation. Rhode Island's formula limits appropriation requests to 6% growth. *Id.*

Every state has some escape clause to deal with unusual or emergency situations. In many cases, support from a supermajority of the legislature is necessary to exceed the limit.<sup>24</sup> In a few states, a referendum of voters is needed.<sup>25</sup> However, in several states with weak restrictions the limits can be amended by a simple majority of the legislature or they are non-binding to begin with.<sup>26</sup> Several states also provide for adjustments when states take on new responsibilities, such as the transfer of activities from the local to the state level, or for transfers within the state budget from non-general to general fund sources.<sup>27</sup> Several states which limit revenues also have explicit provisions for the use of excess revenues, such as tax relief or the building up of a "rainy day" fund.<sup>28</sup>

Tax and expenditure limitation measures vary greatly from state to state. It is clear that their design is not a simple matter. The base of what to limit (appropriations, revenues, taxes, etc.) must be determined first, and then the appropriate constraint must be chosen. Too low a limit may cause disruption of state activities, while too large a limit may tacitly encourage a larger-sized government. The difficulty lies in choosing a limit that effectively restrains excessive government while not hampering vital state activities, especially when the economic environment is rapidly changing.

### III. ESTABLISHING LIMITS: ARGUMENTS PRO AND CON

The debate over the use of limitation measures has been very heated. The intellectual discussion goes beyond the age-old argument about whether taxes are too high or whether governments spend excessive amounts. It goes to the fundamental question of the efficacy of majority rule decision-making in regard to fiscal matters. Sophisticated arguments favoring limitations suggest that political decision-makers need to be constrained by a "fiscal constitution" because of the potential inefficiency of unconstrained majority rule.

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24. *Id.* at 148-51 (Table 92) (Alaska, Arizona, Hawaii, Idaho, Michigan, Missouri, Montana, South Carolina, Utah and Washington).

25. *Id.* (Alaska and New Jersey).

26. *Id.* (Colorado, Louisiana, Oregon and Tennessee).

27. *Id.*

28. *Id.* at 145, 160-63 (Tables 90 and 97) (Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and Wyoming).



From a normative standpoint, it can be argued that the primary role of government is to provide various types of public services<sup>29</sup> (e.g., national defense, social welfare programs, etc.) that cannot be adequately provided by the private market. Coercion is necessary to provide financing for these types of services because of the "free-rider" problem. Since citizens can potentially receive the benefits of public services regardless of whether they contribute to their provision, it is usually necessary for the government to finance these activities through compulsory taxes.

Governments have the potential to increase economic efficiency by exploiting gains from the provision of public services through their power to raise revenue through coercion. For example, governments must use their taxing power to provide needed activities such as national defense, police protection, and public health services. However, the various institutions created for these purposes may also be used to redistribute resources for reasons based upon the narrow self-interest of the recipients in a negative sum game. This process, known as rent-seeking, may result in substantial lobbying costs for those seeking the transfer as well as those attempting to thwart it.

With majority rule in a representative democracy, the various participants in the political process face differing incentives that affect how actively they participate. A relatively small group of rent-seeking activists may exert more influence on the legislative process than a passive majority. The potential gains to the small but active group may be very large on a per-member basis. They may be willing to spend large amounts of money and time to influence the outcome of the decision-making process. On the other hand, the larger unorganized majority may lack the cohesion to defend their own interests. The per-person cost imposed on this large, diffuse group by the small active group is small, creating limited incentives for the unorganized majority to mount an effective resistance.

This scenario suggests that legislatures may come to be dominated by coalitions of small special interest groups, each with its own spending priorities. Related theories have suggested that government fiscal behavior can be explained by budget-maximizing bureaucrats,<sup>30</sup> or in the most extreme case, as a Leviathan exploiting citizens.<sup>31</sup> These

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29. Public goods are defined as goods and services that are not subject to exclusion (based on price) or rivalry. *See generally* H. ROSEN, PUBLIC FINANCE ch. 5 (2d ed. 1988).

30. *See* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 24-29 (1971).

31. G. BRENNAN & J. BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION (1980).

theories suggest that there is a strong tendency for unconstrained democratic governments to grow too large and to respond to special interests at the expense of more general, diffuse interests.

In summary, the arguments for tax and expenditure limits are based on the belief that government has become, or is likely to grow, too large because of failures by decision-making institutions. Somehow, normal political institutions are incapable of accurately reflecting the preferences of a majority of citizens regarding everyday taxation and expenditure decisions. The reason for this failure may relate to the undue power of special interest groups, the use of legislative techniques such as log-rolling, or the lack of effective voter control over elected officials and bureaucrats. Without this perceived political failure, excessive governmental spending and taxation would be avoided by the normal voting activities of citizens and by the actions of their elected representatives.

To control fiscal excesses, proponents of tax and expenditure limits suggest that extraordinary measures need to be put in place to address the failures of the political system that result in an overly large government sector. Effective limits would make it more difficult for special interest groups to increase spending and would place more pressure on bureaucrats to restrict their activities. Proponents do not suggest that the limits should be immutable. Like any law or constitutional provision, tax and expenditure limitations can be revised or amended, although the process of change is purposely made more difficult than normal legislative decisions. In certain situations, limits may well prevent a legitimate majority from following their preferred course of action. This is an expected cost of restraining inefficient government activities. A desirable by-product may also be a reduction of wasteful lobbying efforts by groups seeking government favors and also a reduction in the resources needed to oppose these efforts.

The rejoinder to the arguments in favor of tax and expenditure limitation propositions focuses on three points.<sup>32</sup> The first is the assertion that government is not really too large, is not growing out of control and is not perverting the will of the legitimate majority.<sup>33</sup> If this is true, limitation measures would presumably fall of their own weight and fail to win approval. Another response deals with the pragmatic problems associated with designing and implementing such

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32. See W. OATES, *Fiscal Limitations: An Assessment of the U.S. Experience* in CONTROL OF LOCAL GOVERNMENT 91-136 (E. Gramlich & B. Ysander eds. 1985).

33. R. MUSGRAVE, *Leviathan Cometh—or Does He?* in TAX AND EXPENDITURE LIMITATIONS 77-120 (H. Ladd & N. Tideman eds. 1981).



constraints. It is suggested that certain types of expenditures are mandated obligations of state governments or entitlements not under the state's control. This includes spending on unemployment benefits and welfare support. For example, a limit might mean that a state would be prevented from responding to the problems created by an economic recession. In essence, limits may do their job too well by severely restricting the range of government activities available to respond to changing conditions. The negative side effects of this remedy for excessive government may be more severe than the disease itself.

Finally, it is suggested that limitation measures are ultimately ineffective. They may be so weak that they will simply be ignored or overturned. In addition, constraints will lead to increases in hidden expenditures, such as off-budget activity, user charges, and increased borrowing or increased spending by local governments. Proponents of this view believe that limitation efforts will ultimately be futile, or even counterproductive, in that they may encourage government to engage in lower priority activities as well as those outside the scrutiny of the public.<sup>34</sup>

The debate over tax and expenditure limitations is a complicated one that often mixes normative judgments about the proper role of government with positive beliefs about the performance of the political system. Limitation mechanisms are usually proposed by conservative groups and opposed by liberals. Yet, these conservatives believe that they are likely to be ultimately ineffective. As yet there is relatively little evidence about the quantitative effect of these measures in controlling the size of state government.

#### IV. THE EXPERIENCE OF OTHER STATES

Between 1976 and 1982, nineteen states passed some type of limitation measure.<sup>35</sup> In two of these states the limitations are no longer in effect, but two additional states passed measures in 1986 and 1987. It is suggested that these actions were in response to the rapid growth of state governments after World War II. Table 1 presents information on state government activity for selected years beginning in 1954.<sup>36</sup>

By almost any measure, state government grew very rapidly until the mid-1970's. However, the mood of the country began to change

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34. Bails, *A Critique of the Effectiveness of Tax-Expenditure Limitations*, 38 PUBLIC CHOICE 129-38 (1982).

35. SIGNIFICANT FEATURES, *supra* note 1, at 148-51 (Table 92).

36. *See infra* Table 1 at p. 813.

and there was a major slowdown in the rate of growth of state government in the late 1970's. It is unlikely that the limitation measures caused this slowdown, since it occurred prior to the adoption of most plans. Instead, it is more likely that the reduction in the growth rate of state government and the adoption of these limitation measures were both the result of growing dissatisfaction with the size of government.

The current status of state limitation measures is summarized in Table 2.<sup>37</sup> This listing of limitations for twenty-one states shows the diversity that exists across adopting states. The jury is still out on their effectiveness in controlling the size of government. State government grew considerably in the United States from 1979 to 1986.<sup>38</sup> Generally, states with limitations in place spend less than other states. However, both the propensity to pass limitations and the relatively smaller size of government may reflect tastes in these states for smaller government. That is, the limitations may not have been important in reducing the government's size. A preliminary empirical study found little, if any, impact of limitations on the level of state activity.<sup>39</sup>

The most dramatic impact of a limitation on state government took place in California in fiscal year 1987. In that year, because of the state's expanding economy, tax revenues exceeded the amount that appropriations were permitted to grow by \$1.1 billion. The state was required to return this amount to taxpayers. At the present time, proponents of greater educational spending in California are attempting to modify the situation by replacing the growth rate limitation based on inflation with one based on personal income growth in order to provide more flexibility.<sup>40</sup> Clearly limitation measures can no longer be dismissed as irrelevant.

## V. TAX AND EXPENDITURE LIMITATIONS: THE IMPLICATIONS FOR ILLINOIS

Even though there is currently little discussion of tax and expenditure limitation measures in Illinois, there has been interest expressed in the past, and the issue almost certainly would arise in a constitutional convention as one of several issues raised by various single-issue groups.

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37. See *infra* Table 2 at p. 814.

38. SIGNIFICANT FEATURES, *supra* note 1, at 6-11 (Tables 1-3).

39. Abrams and Dougan, *The Effects of Constitutional Restraints on Governmental Spending*, 49 PUBLIC CHOICE 101-116 (1986).

40. See Schaafsma, *California Taxpayers Say: 'Thanks, State Spending Limit,'* THE FISCAL NEWSLETTER, (Nov./Dec. 1987).



While no state limitations were approved when other states were considering these measures, Illinois voters did approve, by a wide margin, a non-binding referendum in 1978 that read: "Shall legislation be enacted and the Illinois Constitution be amended to impose ceilings on taxes and spending by the state of Illinois, units of local government and school districts?"<sup>41</sup>

At about this time, a constitutional amendment was proposed that called for limiting state taxes to eight percent of the state's personal income and prohibiting local governments from increasing taxes by more than three percent per year without approval of the voters in the jurisdiction. The amendment never received legislative approval, and thus was never placed before the voters. The proposed amendment was opposed not only by liberals, but also by many conservatives who believed that the ceiling of eight percent was too high and might actually encourage more spending. In retrospect, the limitation on state taxation (had it been approved) would have been unimportant since state taxes as a percentage of personal income have generally declined from their mid-1970's levels.

While Illinois is not among the states with these explicit limitations, the state does have several traditional constitutional provisions promoting fiscal discipline, such as an annually balanced budget requirement and a line item and reduction veto. In addition, the state has a constitutional prohibition against graduated income tax rates and a limit on the corporate tax rate as a percentage of the individual rate.

The growth of state government in Illinois has paralleled national trends. This is shown in Table 3.<sup>42</sup> Both the absolute and relative size of state government grew until the mid-to-late 1970's. As a result of the recessions of the early 1980's, state government actually decreased in size. Since that time, the level of state activity has again reached that of the mid-1970's. This suggests that Illinois has been able to control state government rather well without the benefit of explicit limitation measures. The combination of the balanced budget requirement along with the unwillingness of the General Assembly members to raise taxes seems to have effectively limited the growth of state government in recent years.

Given Illinois' ability to control the size of state government, it is unlikely that an explicit limitation measure could be crafted that

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41. See Chicago Tribune, Nov. 9, 1978, § 1, at 10, col. 6 (the advisory referendum received 82% support), *id.* at 13, col. 2 (referendum passed by 4 to 1 margin).

42. See *infra* Table 3 at p. 815.

would effectively limit state activities without unduly restricting the state's ability to carry out its traditional governmental functions. This suggests that any limitation measure that might be approved would probably be largely cosmetic, giving the appearance of restraint without actually constraining fiscal behavior.

## VI. CONCLUSION

From this discussion, it seems that limiting state government is not a high priority issue that would call for a constitutional convention, and if a convention is held, it is an issue that is best left out of any revised constitutions. The potential problems connected with limitation measures very likely outweigh the benefits that might result.



Table 1  
Levels of State Government Activity

State Activity (All States)	1954	1964	1974	1979	1986
Own Source Expenditure as % of GNP	3.4%	4.3%	6.2%	5.8%	6.2%
Per Capita Expenditure 1982\$	\$299	\$447	\$787	\$818	\$936
Own Source Receipts as % of GNP	3.6%	4.6%	6.5%	6.6%	7.3%
Per Capita Receipts 1982 \$	\$313	\$478	\$826	\$936	\$1,117

Source: Significant Features of Fiscal Federalism, 1987 Edition, ACIR

Table 2  
Tax and Expenditure Limitation Measures

<u>State</u>	<u>Year</u>	<u>Measure</u>	<u>Base of Limit</u>	<u>Limitation</u>
Alaska	1982	Statutory	Appropriations	Inflation and population growth rates(g. r.)
Arizona	1978	Constitut.	Appropriations from state taxes	7% ofstate personal inc.
California	1979	Constitut.	Appropriations from state taxes	Inflation and population growth rates
Colorado	1979	Statutory	Appropriations	7% growth rate
Hawaii	1978	Constitut.	Appropriations	Personal income g. r.
Idaho	1980	Statutory	Appropriations	5 1/3% of state per. inc.
Louisiana	1979	Statutory	State tax revenues	Base per.% of per.inc.
Mass.	1986	Statutory	State tax revenues	Wages andsalary g. r.
Michigan	1978	Constitut.	State Revenues	Base per. % of per. inc.
Missouri	1980	Constitut.	State revenues	Base per. % of per. inc.
Montana	1981	Statutory	Appropriations	Personal income g. r.
Nevada	1979	Statutory	Proposed Approp.	Inflation and pop. g. r.
New Jersey*	1976	Statutory	Appropriations	Per cap. per.inc. g. r.
New Mexico	1987	Statutory	Proposed Approp.	Wages and salary g. r.
Oregon	1979	Statutory	Appropriations	Personal income g. r.
Rhode Island	1977	Statutory	Proposed Approp.	6% growth rate
So. Carolina	1980	Constitut.	Appropriations	Personalincome g. r.
	& 1984			or 9.5% of pers. inc.
Tennessee	1978	Constitut.	Appropriations from state taxes	Personal incomeg. r.
Texas	1978	Constitut.	Appropriations from state taxes	Personal income g. r.
Utah*	1979	Statutory	Appropriations	85% of pers.inc. g. r.
Washington	1979	Statutory	State tax revenues	Personal income g. r.

\* Not currently in effect.  
Source: Significant Features of Fiscal Federalism, 1986 Edition, ACIR and inquiries by authors.



Table 3  
State Government Taxation and Revenue in Illinois

	1972	1977	1982	1987
Per Capita State Tax Revenue in 1987 Dollars	\$784	\$847	\$751	\$860
Per Capita Total State Source Revenues in 1987 Dollars	\$943	\$988	\$881	\$1,112
State Taxes as Percentage of State Personal Income	5.6%	5.6%	5.2%	5.4%
Total State Source Revenues as Percentage of State Personal Income	6.8%	6.5%	6.1%	6.8%

Source: Derived from *Illinois State Budget*, various years and *Illinois Bi-Monthly Data Sheets*, various issues.





# Increased and Accessible Illinois Judicial Rulemaking

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## INTRODUCTION

Much of the responsibility in Illinois for establishing procedural law guiding the operation of courts and the practice of law is now shared by the General Assembly and the Illinois Supreme Court. While pockets of guidelines are, and should be, within the judiciary's absolute control and thus immunized from any legislative interference, less than absolute judicial authority over the bulk of procedural law is preferred by most commentators and by most American states.<sup>1</sup> In settings where such responsibility is shared, typically there is a primary lawmaker, who initiates most procedural law changes, and a secondary lawmaker, who possesses far less initial responsibility but who usually maintains some final power of review. Where procedural lawmaking responsibility is shared, there are varying means by which the primary and secondary authority may be distributed and exercised.

Unfortunately, the present distribution of responsibility for Illinois procedural law is troublesome. The division of primary authority between the legislature and the judiciary is unclear, resulting in instances of conflicting statutes and rules. Where primary authority has been assumed by the legislature, the choice of primary lawmaker is wrong. As well, the attributes of secondary authority over procedural law are uncertain, as evidenced by cases involving exclusive judicial rulemaking.

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1. See KORBAKES, ALFINI & GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS (1984) (50 state survey of judicial rulemaking procedures). For an excellent bibliography on judicial rulemaking, see *id.* at 293-306. See also GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY (1984).

Besides distributional problems, the exercise of procedural law-making power often is troublesome because of the decision-making processes utilized. In particular, in promulgating rules, the Illinois Supreme Court usually employs too secretive and closed a process. This process typically involves advisory committees whose members, duties and ongoing work are relatively unknown.<sup>2</sup> And, in enacting procedural statutes, the General Assembly also often employs an inadequate deliberative process, in that it fails to hear fully from the legal profession. Exemplary is its recent consideration of standards on the certification of claims by attorneys.<sup>3</sup>

This Article suggests that all primary authority over procedural law should now be vested in the Illinois judiciary, with the General Assembly possessing only secondary authority. Part I explains that increased judicial responsibility is supported by the Illinois Constitution, particularly when read in light of its history, and by rationales founded on expertise, efficiency and separation of powers. Greater judicial control over procedure should not be fully assumed by the supreme court; rather, bodies consisting of judges from varying courts, as well as lawyers, legislators and others, should exercise significant rulemaking duties. Finally, all judicial rulemaking processes must be open and accessible.

Constitutional amendment is the best, and perhaps the only, way to remedy existing problems in the distribution and exercise of procedural lawmaking responsibility. The current hodgepodge of constitutional provisions should be replaced by a small set of directives which clearly define primary and secondary authority. The recognition of primary judicial authority should be accompanied by assurances that judicial rulemakers employ open and accessible decision-making processes. While Illinois judges are quite accustomed to law-making during adjudication, they are less experienced in lawmaking during rule promulgation. Experience indicates that Illinois judicial rulemaking now occurs on occasion without significant opportunity for public input. Promulgation of rules in closed and secretive meetings should hereinafter be expressly discouraged in order to assure greater adherence to democratic principles and better rules.

## I. INCREASED JUDICIAL AUTHORITY FOR PROCEDURAL LAW

Current Illinois constitutional law recognizes a shared responsibility for most procedural law. Beyond the general provisions dealing

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2. See *infra* note 108 and accompanying text.

3. See *infra* notes 52-62 and accompanying text.



with separation of powers<sup>4</sup> and the vesting of legislative<sup>5</sup> and judicial<sup>6</sup> powers, the constitution contains several provisions expressly recognizing both legislative and judicial responsibility for laws guiding the courts and the legal profession. Legislative responsibility is recognized in constitutional declarations that the "Appellate Court shall have such powers of direct review of administrative action *as provided by law*"<sup>7</sup> and that "Circuit Courts shall have such power to review administrative action *as provided by law*."<sup>8</sup> Judicial responsibility is recognized in statements that the supreme court "shall" provide by rule for certain matters relating to appeals;<sup>9</sup> "may" provide by rule for other appellate matters;<sup>10</sup> "shall adopt rules of conduct for Judges and Associate Judges;"<sup>11</sup> and "shall provide by rule for matters to be assigned to Associate Judges."<sup>12</sup> Further, the constitution provides that the general administrative and supervisory authority over all courts is vested in the Illinois Supreme Court, to be exercised by its Chief Justice in accordance with its rules.<sup>13</sup>

Notwithstanding such declarations, much of the responsibility for Illinois procedural law remains unaddressed constitutionally. There are no express provisions on practice and procedure laws, on evidentiary principles, or on regulations governing the practice of law. However, there have been attempts at change. In 1922, for example, there was a proposal to add to the Illinois Constitution the following:

The Supreme Court shall have exclusive power to prescribe rules of pleading, practice and procedure in all courts; but rules not inconsistent therewith may be prescribed respectively by other courts of record. Any rule of pleading, practice or procedure may be set aside by the General Assembly by a special law limited to that purpose.<sup>14</sup>

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4. ILL. CONST. art. II, § 1.

5. ILL. CONST. art. VI, § 1.

6. ILL. CONST. art. VI, § 1.

7. ILL. CONST. art. VI, § 6 (emphasis added).

8. ILL. CONST. art. VI, § 9 (emphasis added).

9. ILL. CONST. art. VI, §§ 4(b), 5, and 6.

10. ILL. CONST. art. VI, § 6.

11. ILL. CONST. art. VI, § 13(a).

12. ILL. CONST. art. VI, § 8.

13. ILL. CONST. art. VI, § 16. Of course, an express recognition of judicial rulemaking power may be superfluous should such a power exist in the absence of any constitutional delegation. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 146-47 (1985) (appellate courts have "supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation", though there is no mention of a provision expressly delegating such authority).

14. RECORD OF PROCEEDINGS, FIFTH ILLINOIS CONSTITUTIONAL CONVENTION Vol. V 4778.

And in 1952, the following constitutional amendment was urged:

The Supreme Court shall make rules governing practice and procedure in all courts. Subject to its rules, the judges of each district of the appellate court and the circuit judges of each circuit court may make rules governing practice and procedure in their courts.<sup>15</sup>

Though efforts to add such new provisions have been unsuccessful to date, other Illinois constitutional history suggests that much primary authority for procedural law shifted to the judiciary. Public policy rationales as well as constitutional history support the desirability of increased judicial rulemaking and several Illinois Supreme Court decisions have recognized the shift toward greater judicial accountability.<sup>16</sup> Yet, to date, the high court has failed to exercise this new authority in a significant manner. Further, the legislature has given few signals of its willingness, or wish, to reduce its role in procedural law-making. Constitutional amendments seem necessary so that the boundaries between legislative and judicial responsibility for procedural law are clearer and so that increased judicial rulemaking will be assured.

#### A. CONSTITUTIONAL HISTORY

Over the years, the General Assembly has been delegated less and less control over court structure and jurisdiction and thus over judicial power. Increasingly, the parameters of the judicial power are being defined constitutionally, with the result that the General Assembly's authority regarding court procedure is more frequently founded on the general grant of legislative power and less frequently on specific delegations of authority over courts.

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15. Proposed amendment to the Judicial Article of the ILL. CONST. of 1870, art. VI, § 3 (1952). The high court power was seen as not disturbing "the historic power of the legislature to act where the court has not acted." MEMBERS OF THE JOINT COMMITTEE ON THE JUDICIAL ARTICLE, EXPLANATORY STATEMENT ON THE PROPOSED JUDICIAL ARTICLE FOR THE CONSTITUTION OF THE STATE OF ILLINOIS 41 (W. Cedarquist ed. 1953). See also Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW. U.L. REV. 443, 455 (1952).

16. See, e.g., *People v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937) (see *infra* notes 43-51 and accompanying text); *People ex rel. Brazen v. Finley*, 119 Ill. 2d 485, 519 N.E.2d 898 (1988) (see *infra* notes 52-62 and accompanying text); *People v. Taylor*, 50 Ill. 2d 136, 277 N.E.2d 878 (1971) (see *infra* notes 63-71 and accompanying text); *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977) (see *infra* notes 72-81 and accompanying text).



As well, the inherent (that is, the unarticulated, or implicit) judicial authority over procedural law can now more frequently be grounded on constitutional principles. Thus, statutory bases for judicial rulemaking are becoming less relevant (or irrelevant). When judicial authority over procedural law inheres in the constitution, because the judiciary must possess the tools to accomplish its constitutionally-assigned tasks, resulting rules are more likely immunized from legislative change. This is especially true when the judicial authority inheres in a constitutional provision expressly recognizing judicial rulemaking power and failing to indicate any role for the legislature.

A brief review of Illinois constitutional history demonstrates increasing judicial, and diminishing General Assembly, responsibility for courts, for their procedure, and for the legal profession.

Under the 1818 Constitution, the powers of government were divided between the legislative, executive and judicial departments;<sup>17</sup> no department could exercise any powers of another unless "expressly directed or permitted."<sup>18</sup> The legislative department was, however, granted significant duties regarding the judicial department. For example, one provision said: "The judicial power of this state shall be vested in one supreme court, and such inferior courts as the general assembly shall . . . ordain and establish."<sup>19</sup> Other provisions authorized the legislature to require high court justices to "hold circuit courts,"<sup>20</sup> and mandated it to provide for the appointment and duties of justices of the peace.<sup>21</sup>

Under the 1848 Constitution, legislative duties regarding Illinois courts and their procedures were continued, but reduced. The General Assembly could authorize "courts of justice" to grant divorces<sup>22</sup> and could direct "in what manner suits may be brought against the state."<sup>23</sup> It could no longer require high court-justices to "hold circuit courts." Most importantly, the Assembly's total control over lower courts was eliminated. The new constitution declared:

The judicial power of this state shall be and is hereby vested in one supreme court, in circuit courts, in county courts, and

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17. ILL. CONST. of 1818, art. I, § 1.

18. ILL. CONST. of 1818, art. I, § 2.

19. ILL. CONST. of 1818, art. IV, § 1.

20. ILL. CONST. of 1818, art. IV, § 4.

21. ILL. CONST. of 1818, art. IV, § 8.

22. ILL. CONST. of 1848, art. III, § 32.

23. ILL. CONST. of 1848, art. III, § 34.

in justices of the peace; *Provided*, that inferior local courts . . . may be established by the general assembly in the cities . . . but such courts shall have a uniform organization and jurisdiction . . . .<sup>24</sup>

No longer were all lower courts ordained and established by the legislature. Further, the jurisdiction of the circuit courts was defined constitutionally.<sup>25</sup> Yet, the duties of such lower court officials as county judges and justices of the peace continued to be prescribed chiefly by the legislature.<sup>26</sup>

Under the 1870 Constitution, there was a further erosion of legislative authority over procedural law. The General Assembly could not pass local or special laws for regulating the practice in courts of justice; for regulating the jurisdiction and duties of justices of the peace, police magistrates and constables; for changes of venue; for summoning and impaneling juries; or for any other area where a general law could be made applicable.<sup>27</sup> Furthermore, legislative control over the judicial power in the lower courts was diminished, as exemplified by new provisions prescribing much of the jurisdictional authority of county courts and probate courts.<sup>28</sup> Nevertheless, the

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24. ILL. CONST. of 1848, art. V, § 1.

25. ILL. CONST. of 1848, art. V, § 8:

There shall be two or more terms of the circuit court held annually in each county of this state, at such times as shall be provided by law; and said courts shall have jurisdiction in all cases at law and equity, and in all cases of appeals from all inferior courts.

26. ILL. CONST. of 1848, art. V, §§ 18, 19:

§ 18. The jurisdiction of said court shall extend to all probate and such other jurisdiction as the general assembly may confer in civil cases, and such criminal cases as may be prescribed by law, where the punishment is by fine only, not exceeding \$100.

§ 19. The county judge, with such justices of the peace in each county as may be designated by law, shall hold terms for the transaction of county business, and shall perform such other duties as the general assembly shall prescribe: *Provided*, the general assembly may require that two justices, to be chosen by the qualified electors of each county, shall sit with the county judge in all cases; and there shall be elected, quadrennially, in each county, a clerk of the county court, who shall be *ex officio* recorder, whose compensation shall be fees: *Provided*, the general assembly may, by law, make the clerk of the circuit court *ex officio* recorder, in lieu of the county clerk.

27. ILL. CONST. of 1870, art. IV, § 22.

All judges and state's attorneys shall be commissioned by the governor.

28. ILL. CONST. of 1870, art. VI, §§ 18, 20. *See also* ILL. CONST. of 1870, art. VI, § 23 (continuation of superior court of Chicago) and ILL. CONST. of 1870, art. VI, § 26 (criminal court of Cook county).



1870 Constitution continued to permit significant legislative control over judicial power. It expressly recognized legislative authority to create "inferior appellate courts"<sup>29</sup> and to establish a "probate court in each county having a population over 50,000."<sup>30</sup>

General Assembly responsibility for court structure, and thus for procedural law, was dramatically reduced with the constitutional amendments of 1962. One amendment was worded as follows: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."<sup>31</sup> No longer were lower courts to be ordained and established legislatively. Other amendments wholly or substantially eliminated legislative authority over the jurisdiction of the lower courts.<sup>32</sup> In addition, an amendment declared that the Supreme Court was vested with "general administrative authority over all courts," with no express recognition of the opportunity for legislative review.<sup>33</sup>

The movement toward increased judicial rulemaking authority continued under the 1970 Constitution. Thus, while a 1962 amendment granted the Supreme Court the authority to provide by rule for direct appeal in certain cases from the circuit courts to the high court "subject to law hereafter enacted,"<sup>34</sup> the new constitution stated that the supreme court shall provide by rule for direct appeal in such cases, without mentioning the impact of any legislative enactments.<sup>35</sup> Similarly, a 1962 amendment provided that circuit judges shall appoint magistrates to serve at their pleasure "subject to law,"<sup>36</sup> while the new 1970 Constitution provided that circuit courts "shall have such number of Associate Judges as provided by law,"<sup>37</sup> with the matters assigned to associate judges guided by Illinois Supreme Court rule.<sup>38</sup> In addition, the 1970 Constitution declared that the "Supreme Court

29. ILL. CONST. of 1870, art. VI, § 11.

30. ILL. CONST. of 1870, art. VI, § 20. *See also* ILL. CONST. of 1870, art. VI, § 12 (legislature dictates appellate jurisdiction of circuit courts).

31. ILL. CONST. of 1870, art. VI, § 1 (1962).

32. *Compare* ILL. CONST. of 1870, art. VI, § 12 *with* ILL. CONST. of 1870, art. VI, § 9 (1962) (circuit court); *compare* ILL. CONST. of 1870, art. VI, § 11 *with* ILL. CONST. of 1870, art. VI, § 7 (1962) (appellate court). Incidentally, the continuing statutory authorization of a Court of Claims, ILL. REV. STAT. ch. 37, para. 439.1 (1985), seemingly can be justified by the continuing General Assembly responsibility for sovereign immunity law. *See* ILL. CONST. art. XIII, § 4.

33. ILL. CONST. of 1870, art. VI, § 2.

34. ILL. CONST. of 1870, art. VI, § 5 (1962).

35. ILL. CONST. art. VI, § 4(b).

36. ILL. CONST. of 1870, art. VI, § 12 (1962).

37. ILL. CONST. art. VI, § 8.

38. ILL. CONST. art. VI, § 8.

shall adopt rules of conduct for Judges and Associate Judges,"<sup>39</sup> making no mention of legislative review.

The trend is clear. Illinois constitutional history from 1818 to 1970 reflects diminishing legislative influence on the Illinois court system. Over the years, the General Assembly's power to create courts and procedural law for the legal profession has diminished. This history also reflects increasing constitutional mandates regarding the structure of state courts and their powers. Such mandates, where ambiguous, are ultimately clarified by judges. Thus, judges are increasingly compelled to define the contours of their constitutional duties and the necessary means by which such duties must be undertaken. In this setting there is more frequently recognized an increased judicial responsibility for procedural law.<sup>40</sup>

#### B. RATIONALES SUPPORTING INCREASED JUDICIAL AUTHORITY

Beyond this constitutional history, increased judicial authority over procedural law can be founded on compelling public policy grounds. In their seminal work on constitutional allocations of procedural lawmaking powers between the legislature and the judiciary, Professors Levin and Amsterdam summarized the arguments supporting primary judicial authority as follows:

[L]egislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a

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39. ILL. CONST. art. VI, § 13(a).

40. Bonaguro, *The Supreme Court's Exclusive Rulemaking Authority*, 67 ILL. B.J. 408 (1979). This is not to suggest that where a legislature has absolute control over a court's business, even to the point of being able to abolish the court, there is also absolute legislative control over the ways in which such business is conducted. See *U.S. v. Howard*, 440 F. Supp. 1106, 1110 (D. Md. 1977), *aff'd*, 590 F.2d 564 (4th Cir. 1979) ("the fact that Congress can create the lower federal courts does not alter the conclusion that it cannot validly establish a timetable for judicial action"). Inherent in legislative establishment of a court may be a delegation of certain judicial powers immunized from legislative review absent disestablishment.



bar association molders in committee; and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant reexamination of procedural methods.

Moreover, it must be remembered that a very large part of maintaining maximum effectiveness in the courts does not lie in drastic wholesale procedural reform, but in the necessary minor alterations of single rules from time to time as experience dictates, and such small matters as these inevitably fare badly when they must compete for legislative attention. . . . Codes tend to foster litigation of procedural issues, since the legislature cannot clarify by simple pronouncement whatever ambiguity may inhere in its codes and the courts themselves can provide clarification only in the process of adjudication. Court rules, on the other hand, are flexible in application, easy of clarification, and rapid of amendment should amendment be required. They are the work of an agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience.<sup>41</sup>

In Illinois, these bases supporting primary judicial authority are joined with rationales related to the troubles caused by existing divisions of procedural lawmaking responsibility. The constitution now indicates that much of the responsibility for procedure is shared by the General Assembly and the supreme court. Some uncertainty among lawmakers about accountability is inevitable in such a system. As well, some difficulty in harmonizing statutes and rules covering a single topic is normal. Yet, confusion is heightened in Illinois, since different bodies are designated as the primary lawmaker, with the differences based on the nature of the procedural guidelines. Legal

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41. Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10-11 (1958) (citations omitted). And consider the following: "[T]he legislature, informed . . . of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend." Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921). This public policy perspective is not new to Illinois. See Trumbull, *supra* note 15, at 452 ("The arguments for primary or exclusive judicial responsibility for the regulation of practice and procedure in the courts are in the aggregate more impressive and more persuasive than those for paramount legislative responsibility").

reformers consequently often run between the legislature and the judiciary, in doubt as to who possesses primary authority over an issue or who has the initial power to act. In Illinois today, the supreme court possesses primary authority over administrative, supervisory, professional conduct, and most appellate practice rules, while the General Assembly exercises (though it may not rightfully possess) primary authority over most other practice and procedure areas.

Beyond the foregoing reasons, primary judicial authority over *all* procedural law would help lessen the growing problems caused by differences between absolute and less than absolute rulemaking power. In Illinois, there are increasing pockets of procedural law deemed within the high court's absolute control. Such areas seemingly include at least the regulation of those admitted to legal practice and the rules of appellate procedure. They may also include all guidelines "necessary to the full performance of the judicial function."<sup>42</sup> The case law recognizing such absolute high court authority is, of course, tied to the noted constitutional developments. Unfortunately, absolute power is often confused with the concept of exclusive power. A brief review of selected Illinois cases will demonstrate a failure to differentiate the areas subject to absolute power or to define the varying forms of exclusive power. Assertions of absolutism and exclusivity in rulemaking then compound the difficulties already inherent in the Illinois system of shared powers where the primary authority over procedural law is divided between the legislature and the judiciary.

In the area of admission to legal practice, the Illinois Supreme Court has long held that the power to regulate and define the practice of law is a prerogative of the judiciary as an incident to the separation of powers.<sup>43</sup> This separation creates within the judicial branch the inherent authority to regulate the study of law and the admission to the bar.<sup>44</sup> As a result, the judiciary possesses the final authority to define the nature of legal practice by laypersons as well as by lawyers.

*People v. Goodman*,<sup>45</sup> for example, involved legislation granting the Illinois Industrial Commission the power to make rules dictating procedure before it. Pursuant to this grant of authority, the Commis-

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42. *People v. Jackson*, 69 Ill. 2d 252, 257, 371 N.E.2d 602, 604 (1977). See generally Graham, *Introduction: The Illinois Supreme Court at the Threshold*, 1978 U. ILL. L.F. 104, 106 (1978) (the breadth of the opinion in *Jackson* suggests that sections of the Civil Practice Act are unconstitutional even where statutes do not conflict with judicial rules).

43. *People v. Goodman*, 366 Ill. 346, 349, 8 N.E.2d 941, 944 (1937).

44. *Id.* at 349-50, 8 N.E.2d at 944.

45. 366 Ill. 346, 8 N.E.2d 941 (1937).



sion had promulgated a rule allowing a claimant to be represented by his attorney or "agent."<sup>46</sup> Under this rule, a non-lawyer had built a lucrative practice of handling compensation claims.<sup>47</sup>

In finding that the non-lawyer had engaged in the unauthorized practice of law and therefore should be fined, the Illinois Supreme Court held that the unlicensed practice of law, whether in or out of court, is a contempt in that it usurps the privilege of an attorney to practice law.<sup>48</sup> The court noted that although the General Assembly may pass laws forbidding certain legal practice, such laws can only augment, but cannot "supersede or detract from, the power of the judicial department to control the practice of law."<sup>49</sup>

Thus, the *Goodman* court concluded that the legislature could not view the practice of law as being confined to courtroom activity, and that the assembly could not bestow upon an administrative body the authority to confer upon a layperson the right to practice law. Rather, the court said the definition of legal practice and the establishment of standards lie within the "inherent" realm of the judiciary.<sup>50</sup>

In *Goodman*, the Illinois Supreme Court claimed an exclusive authority to regulate admission to the bar. In that context, the power was superior but not absolute, because judicial authority was subject to supplementation and augmentation by statutes which added to, but did not contradict, existing judicial rules.<sup>51</sup> Like the regulation of

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46. *Id.* at 352, 8 N.E.2d at 945.

47. *Id.* at 348-49, 8 N.E.2d at 943.

48. *Id.* at 350, 8 N.E.2d at 944.

49. *Id.* at 349, 8 N.E.2d at 944.

50. *Id.* at 349-50, 8 N.E.2d at 944.

51. Language in *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), further demonstrates the high court's acknowledgement that its standards of admission to the bar permit supplementation by statute. There, the petitioner had successfully passed the Illinois Bar Examination, but the Committee on Character and Fitness determined that he did not possess the general fitness necessary for admission. This determination was based upon petitioner's refusal to discuss his possible membership in the Communist Party. The Committee's opinion was premised on the notion that a member of the Communist Party "might not be able in good faith to take the oath of office. . . ." *Id.* at 474, 121 N.E.2d at 828. Holding that the Committee had properly inquired into petitioner's ability to take the oath in good conscience, the court stated:

In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58 which governs admissions and provides . . . that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of

admission to legal practice, the supreme court has also declared its exclusive domain over the governance of those admitted to the bar. But in this latter context, the term may mean an absolute or sole authority to govern attorneys which does not admit supplementation or augmentation by any other lawmaker. Thus, in *People ex rel. Brazen v. Finley*,<sup>52</sup> the Illinois Supreme Court invalidated a circuit court rule requiring an affidavit of compliance with various ethical rules adopted by the circuit court. The local rule mandated that an affidavit accompany initial pleadings in specific types of cases, including personal injury and domestic relations actions.<sup>53</sup> The local

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approval by a Committee on Character and Fitness. . . . Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath . . . . Such an oath requires loyalty to our government . . . thus inquiry aimed at determining the loyalty of an applicant, must be deemed to be relevant to a determination of the conditions for admittance fixed both by the statute and by the rule of this court.

*Id.* at 475-76, 121 N.E.2d at 829. *See also* *Lozoff v. Shore Heights, Ltd.*, 66 Ill. 2d 398, 362 N.E.2d 1047 (1977), where a Wisconsin attorney sought recovery of legal fees for services he had rendered in Illinois. There the court cited, with approval, ILL. REV. STAT. ch. 13, para. 1 (1969), which prohibited the allowance of attorneys fees for persons other than attorneys licensed in Illinois. Reciting language from *Goodman*, the court held: "Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law." *Id.* at 402, 362 N.E.2d at 1048-49.

The legislature's secondary authority over admission to the bar, however, is limited. Legislation must be both general and reasonable. These requirements were expressed in *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899). There, the General Assembly had passed legislation that whenever the Illinois Supreme Court changed its rules of admission to the bar, such new rules could only have prospective force. Thus, anyone who had begun studying law before the change could obtain a license by complying with the old rules of admission. As a result of this legislation, it happened that persons who commenced their study before November 4, 1897 could obtain a license by completing only two years of study, but those who began study on or after that date would be required to complete three years of study. The court found the enactment to be "special legislation" and remarked that if the legislature had any authority over admission to the practice of law, such authority could only be exercised through a general law. *Id.* at 80, 54 N.E. at 647. The court further stated that legislation regarding admission to the bar must be reasonable. The court said:

The legislature may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. So long as they do not infringe upon the powers properly belonging to the courts they may prescribe *reasonable* conditions which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the State . . . .

*Id.* at 95, 54 N.E. at 652 (emphasis added).

52. 119 Ill. 2d 485, 519 N.E.2d 898 (1988).

53. COOK COUNTY CIR. C.R. 0.7, *quoted in* *Finley*, 119 Ill. 2d at 488-89, 519 N.E.2d at 899-900.



rules of ethics to be enforced through the affidavit requirement were, in substance, covered by two Supreme Court Rules found in the Code of Professional Responsibility.<sup>54</sup>

In *Brazen*, a licensed attorney challenged the authority of the circuit court to promulgate this affidavit requirement. Proponents of the local rule contended that Supreme Court Rule 21(a) granted to the circuit court the rulemaking authority to impose the affidavit requirement.<sup>55</sup> Rule 21(a) provides that

a majority of the circuit court judges in each circuit may adopt rules governing civil and criminal cases which are consistent with these rules and the statutes of the State, and which, so far as practicable, shall be uniform throughout the State.<sup>56</sup>

Proponents urged that the affidavit requirement was consistent with Supreme Court Rules because it sought, in effect, to assure compliance with certain provisions of the Code of Professional Responsibility. Thus, they argued, the affidavit requirement aided, but did not supplant, the statewide rules.<sup>57</sup>

The supreme court rejected the position that circuit courts share the power to regulate and discipline attorney conduct.<sup>58</sup> Citing earlier cases recognizing that certain high court power is exclusive,<sup>59</sup> the court stated: "This court's *sole* authority to regulate and discipline attorney conduct arises from our inherent power to govern admission to the

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54. Rules 2-103 and 5-103 of the ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, discussed in *Brazen*, 119 Ill. 2d at 490, 519 N.E.2d at 900.

55. *Brazen*, 119 Ill. 2d at 490-91, 519 N.E.2d at 900-01.

56. ILL. REV. STAT. ch. 110A, para. 21(a) (1985), quoted in part in *Brazen*, 119 Ill. 2d at 490, 519 N.E.2d at 900.

57. *Brazen*, 119 Ill. 2d at 490-91, 519 N.E.2d at 900-01.

58. *Id.* at 492, 519 N.E.2d at 901. Proponents of the Cook County rule asserted that the Supreme Court had recognized concurrent authority by the high court and the circuit courts to govern attorney conduct in *Arnold v. Northern Trust Co.*, 116 Ill. 2d 157, 506 N.E.2d 1279 (1987). There, attorneys challenged a circuit court rule requiring attorneys for minors and incompetents in personal injury actions to submit sworn petitions supporting contingent fee requests in excess of 25% of the settlement. The validity of this local rule was upheld. The court in *Brazen* distinguished *Arnold*, stating that it was based upon the circuit court's duty to protect the interests of minors and not upon a finding of concurrent power to regulate attorney behavior. *Brazen*, 119 Ill. 2d at 492, 519 N.E.2d at 901 citing *Arnold*, 116 Ill. 2d at 169, 506 N.E.2d at 1279.

59. *In re Harris*, 93 Ill. 2d 285, 443 N.E.2d 557 (1982); *In re Mitani*, 75 Ill. 2d 118, 387 N.E.2d 278 (1979); *In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E.2d 873 (1958); *People ex rel. Ill. State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931); *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899).

practice of law in Illinois.”<sup>60</sup> Pursuant to this exclusive authority, the Illinois Supreme Court said that it had established a comprehensive scheme for regulating and punishing attorney misconduct.<sup>61</sup> The court concluded that the local rule was an improper transgression upon “the exclusive rulemaking and disciplinary authority invested in the Supreme Court,” in that it “impose[d] a greater burden on attorneys than this court now required,” since the Supreme Court Rules require no affidavit of compliance.<sup>62</sup>

*Brazen* involved a local court rule rather than a statute. The court’s rationale, however, clearly suggests that the source of the offending law was irrelevant to the decision. Rather, where the supreme court enjoys absolute or sole rulemaking authority, there is no room for other laws, regardless of their nature or source.

A third area in which the judiciary has claimed exclusive rulemaking responsibilities involves appellate procedure. As noted earlier, the constitution confers upon the Illinois Supreme Court the power to provide by rule for appeals in certain cases from the circuit courts directly to the supreme court and for appeals to the appellate court from other than final judgments of the circuit court.

Pursuant to this latter power, the court promulgated a rule which allowed appeals by the state of certain orders in criminal cases, including orders suppressing evidence.<sup>63</sup> The General Assembly later enacted contradictory legislation by amending the Code of Criminal Procedure to provide that orders suppressing evidence in a preliminary hearing are non-final and unappealable by the state, thus having no effect in subsequent proceedings.<sup>64</sup> The validity of the legislation was challenged in *People v. Taylor*.<sup>65</sup>

In *Taylor*, the defendant was charged with unlawful possession of narcotics. At the preliminary hearing the judge granted the defendant’s motion to suppress evidence obtained during a search of his residence. Later, a grand jury indicted the defendant for the same offense. At trial the defendant again moved to suppress the evidence,

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60. *Brazen*, 119 Ill. 2d at 492, 519 N.E.2d at 901 (emphasis added).

61. *Id.* at 494, 519 N.E.2d at 902 (referring to the ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY; the Attorney Registration and Disciplinary Commission; the creation of a procedure for the investigation, hearing, and review of charges of attorney misconduct; and, the rules on the types of discipline available for Code infractions).

62. *Id.* at 494, 519 N.E.2d at 902.

63. The former rule is found in *People v. Taylor*, 50 Ill. 2d 136, 139, 277 N.E.2d 878, 880 (1971).

64. *Taylor*, 50 Ill. 2d at 138-39, 277 N.E.2d at 880.

65. 50 Ill. 2d 136, 277 N.E.2d 878 (1971).



arguing that because the state had failed to appeal the previous suppression order, that order was binding. The trial court agreed, but was reversed.<sup>66</sup> The Illinois Supreme Court granted leave to appeal.<sup>67</sup>

The state contended on appeal that as a result of the statute, the order entered in the preliminary hearing was not appealable and was therefore not binding at the subsequent trial. The defendant argued that the section violated the constitutional provision which vests rule-making authority in the Illinois Supreme Court and which provides for no General Assembly participation. Because the court had provided by rule for appeals from orders suppressing evidence, the defendant argued the General Assembly lacked authority to declare such orders non-appealable.<sup>68</sup> In holding the section of the Code void, the court held that the constitution vested "sole authority" in the supreme court to promulgate rules regarding appeals to the appellate court from non-final judgments.<sup>69</sup> Because the order suppressing evidence entered in the preliminary hearing was an appealable order pursuant to the rule and the state did not appeal, the order was found binding on the trial court.<sup>70</sup>

The *Taylor* decision leaves little doubt that the court will jealously guard its rulemaking powers respecting certain appeals, and will strike down legislation contradicting its rules. The validity of a statute which purports to regulate such appeals in areas not covered by Supreme Court Rules is unclear, although language in *Taylor* suggests even such legislation would be void.<sup>71</sup>

One of the most dramatic acknowledgments of exclusive judicial rulemaking authority occurred in the 1977 Illinois Supreme Court

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66. *People v. Taylor*, 124 Ill. App. 2d 268 (1970).

67. *Taylor*, 50 Ill. 2d at 137, 277 N.E.2d at 879.

68. *Id.* at 139, 277 N.E.2d at 880.

69. *Id.* at 140, 277 N.E.2d at 881. The court noted the constitutional rule-making authority relevant to the appellate rule at issue contained no reference to General Assembly participation, though other court rules on appeal could only be promulgated constitutionally if they were subject to law. *Id.* at 139-40, 277 N.E.2d at 880-81. See *supra* notes 34 & 35 and accompanying text discussing ILL. CONST. of 1870, art. VI, § 5 and its subsequent "repeal" in the 1970 Constitution. On this latter point, consider the current constitutional provision on rules involving direct appellate review of administrative agency decisions. See *supra* note 7 and accompanying text; *Benton Police Dept. v. Human Rights Comm'n*, 147 Ill. App. 3d 7, 497 N.E.2d 876 (5th Dist. 1986).

70. *Taylor*, 50 Ill. 2d at 140, 277 N.E.2d at 880.

71. *Id.* The Court in *Taylor* declared that because the constitutional delegation of rulemaking authority employed by the court makes no reference to General Assembly participation, the court was vested with "sole authority." *Id.* at 139-40, 277 N.E.2d at 880-81.

decision of *People v. Jackson*.<sup>72</sup> The case involved the high court's "general administrative and supervisory authority." Under this authority,<sup>73</sup> the Illinois Supreme Court had promulgated a rule which directed trial courts to examine prospective jurors, but which authorized them to allow the parties to question potential jurors directly.<sup>74</sup> This rule conflicted with an amendment to the Code of Criminal Procedure which granted attorneys the right to examine jurors personally.<sup>75</sup> In *Jackson*, the circuit court held this amendment unconstitutional, and apparently refused to allow the defendant's attorney the opportunity to conduct *voir dire* examination.

On appeal, the supreme court framed the issue as "whether control of *voir dire* examination is a judicial or legislative function."<sup>76</sup> The court began its analysis by reciting the constitutional provision on separation of powers, wherein one branch is forbidden from exercising powers properly belonging to another.<sup>77</sup> The court also noted the provision on the "judicial power", finding it to be an "exclusive grant" of power, as well as the provision on "general administrative and supervisory authority."<sup>78</sup> Finally, the court turned to the constitution's provision regarding an annual judicial conference, at which proposals to improve the administration of justice would be developed.<sup>79</sup> Since the foundation for the rule governing *voir dire* was laid by the judicial conference, the court reasoned that it must be "a product of this court's supervisory and administrative responsibility."<sup>80</sup> Hence, the General Assembly lacked authority to regulate *voir dire* examinations, and the statutory amendment constituted an infringement by the legislature upon the judicial branch.<sup>81</sup>

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72. 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

73. *Id.* at 259, 371 N.E.2d at 605.

74. *Id.* at 255, 371 N.E.2d at 603.

75. *Id.* But see *Whitlock v. Salmon*, 56 U.S.L.W. 2575 (Mar. 30, 1988) (No. 18043) (finding a similar statute to be "an acceptable solidification" of a comparable rule).

76. *Jackson*, 69 Ill. 2d at 255, 371 N.E.2d at 603.

77. *Id.* at 255-56, 371 N.E.2d at 604 citing ILL. CONST. art. II, § 1.

78. *Id.* at 256-57, 371 N.E.2d at 604-05 citing ILL. CONST. art. VI, §§ 1, 16.

79. *Id.* at 259, 371 N.E.2d at 605 citing ILL. CONST. art. VI, § 17.

80. *Id.*

81. *Id.* at 260, 371 N.E.2d at 605-06. *Jackson* may soon be expanded to invalidate statutes interfering with the exercise of judicial power even where there is no judicial rule directly in conflict. See, e.g., *David Ware v. Central DuPage Hosp.*, No. 66197 (appeal filed) (1988) (involving statutory right of voluntary dismissal). But see *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 308, 472 N.E.2d 787, 789-90 (1984) (difficulties with statutory right of dismissal should be addressed by legislature).



As the foregoing cases demonstrate, exclusive judicial authority means that court rules will override conflicting statutes. Occasionally, it also means that statutes are forbidden entirely in areas governed by rules, even if the statutes would not conflict with any existing rules. However, by shifting the primary authority over all procedural law completely to the judiciary, concerns about differences between areas of exclusive and non-exclusive power, as well as between areas of primary judicial and legislative authority, will be reduced, if not eliminated. Thus, unfortunate clashes over legislative intrusions into areas of exclusive judicial prerogative will disappear and the efficiency and expertise noted by Levin and Amsterdam will be promoted. In all matters of procedure, the judiciary will assume the bulk of responsibility.

### C. OPEN AND ACCESSIBLE DEBATE

In promulgating a comprehensive set of rules, the judiciary must abide by democratic principles mandating that majority sentiment usually prevail and that such sentiment be determined after an open debate accessible to all who wish to participate. In so doing, the judiciary can accommodate the legislature's concerns about particular rules—whether or not in the area of absolute judicial power—by implementing a deliberative process which necessitates input from General Assembly members. Disputes over the boundaries of legislative and judicial power will inevitably continue to arise; yet, with open and accessible judicial rulemaking for all areas of procedural law, conflicts should become less frequent.

With primary, if not absolute, judicial authority over all procedural law, disputes about the boundaries of governmental power will most likely arise when the legislature passes a law significantly affecting procedure but designed to foster a substantive law policy. One such law in Illinois deals with the certification of claims by attorneys in medical malpractice actions.<sup>82</sup> Though arguably within the sphere

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82. ILL. REV. STAT. ch. 110, para. 2-622 (1985). *But see* Parness, *Frivolous Pleadings in Illinois: Observations on the 1985 Medical Malpractice Reforms*, 74 ILL. B.J. 238 (1986) (suggesting the Illinois Supreme Court was "better suited" to alter medical malpractice pleading law); Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 245, 354-55 (1988) (noting Texas Supreme Court's repeal of a comparable Texas statute on actions in tort). *See also* Struckoff v. Struckoff, 76 Ill. 2d 53, 389 N.E.2d 1170 (1979) (statute requiring bifurcated trial in marriage dissolution action is not unconstitutional as a legislative encroachment upon judicial rulemaking, at least where there exists no conflicting rule, since legislature controls conditions of dissolution and since it is reasonable to protect all whose lives are impacted by an end to a marriage).

of legislative power because of its goal to reduce the litigation burdens of the medical profession and its insurers, in enacting this law the General Assembly failed to engage in an adequate deliberative process. The procedural dimensions of the law went largely unconsidered by legislators chiefly responsible for court and legal profession guidelines, as well as by Illinois judges and lawyers.<sup>83</sup> Perhaps the inattention to procedural law policy occurred because the law was subsumed in a package of proposals largely focused on substantive tort reform. More alarming still is a second recent statute dealing generally with claim certification by attorneys, thus covering claims and defenses in all civil actions regardless of their nature.<sup>84</sup> That act seemingly intrudes upon an area within, at least, primary judicial authority as it involves attorney conduct. The act's relationship to any particular substantive law policy remains unclear.<sup>85</sup> Again, adequate deliberations on procedural law concerns seemed absent in the legislature.<sup>86</sup> This is particularly troubling as the certification law is quite controversial, having been rejected by some jurisdictions and undergoing reconsideration in others where it has already been adopted.

Increased judicial rulemaking, undertaken in an open and accessible way, would help diminish disputes over proposed substantive law statutes having significant procedural law implications. Mechanisms to assure dialogue on such statutory proposals between legislators and judicial rulemakers would exist in an open and accessible judicial rulemaking mechanism. With advance warning, constitutional questions regarding separation of powers could even be avoided if the rulemakers adopted the procedural law components of any such statute as part of a new rule.<sup>87</sup>

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83. See letter from Senator Roger Keats to Jeffrey A. Parness (Sept. 4, 1985) (copy permanently on file with the N. ILL. U.L. REV.).

84. ILL. REV. STAT. ch. 110, § 2-611 (Supp. 1986).

85. See Parness, *supra* note 82, at 240 ("It may well be that the Illinois General Assembly has some authority to attempt to alter attorney conduct. Nevertheless, the Illinois Supreme Court is usually better suited to such a task, particularly when the conduct has no substantive law implications."). *But see, e.g.,* Patterson v. Northern Trust Co., 286 Ill. 564, 122 N.E. 55 (1919) (checking "pestiferous litigants" is the responsibility of the General Assembly).

86. Solovy, Wedoff & Bart-Howe, *Attorney Sanctions Under Section 2-611 of Code*, 133 Chi. Daily L. Bull., Jan. 13, 1987, at 2, col. 1 ("Due to the speed with which the law was enacted, there is a dearth of legislative history . . .").

87. See, e.g., *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979), *modified on other grounds*, 404 So. 2d 443 (1981) ("To avoid multiple appeals and confusion . . . caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional . . . the Court . . . adopts . . . the provisions of the evidence code . . . to the extent that they are procedural . . ."). *Id.*



Boundary disputes between the legislature and judiciary are also likely to arise when the judiciary, as primary lawmaker, promulgates a rule having a significant impact on the enforcement of a substantive right within the legislature's domain or on a right guaranteed constitutionally. Consider judicially-promulgated rules on derivative or class actions,<sup>88</sup> as well as rules governing the conduct of a jury trial.<sup>89</sup> Again, open and accessible judicial rulemaking will satisfy democratic principles, and will assure the dialogue between legislators and judicial rulemakers which is necessary to minimize infringements of substantive rights by procedural rules.

Beyond reducing problems caused by differences between areas of absolute and shared responsibilities, and between procedural guidelines subject to one primary lawmaker or another, increased judicial rulemaking, undertaken in conformity with democratic principles, will result in almost all procedural law reforms being initiated by the judiciary. Thus, most procedural law should be found in judicial rules, and the difficulties created by the need to integrate procedural law statutes and rules would be substantially eliminated. Accountability for procedural law reform would also be clearly placed. The prospect of procedural law reformers running back and forth between the legislature and the courts would be significantly reduced.<sup>90</sup>

## II. REMEDIAL CONSTITUTIONAL AMENDMENTS

Primary judicial authority for all procedural law is supported by both constitutional history and strong public policy rationales. Such authority can be exercised without forsaking cherished democratic principles. Yet, without express constitutional mandate, such authority seemingly will not be exercised. While the legislature long ago expressly delegated procedural law-making powers to the judiciary at a time when Illinois constitutional law on judicial power recognized

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88. See, e.g., Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971).

89. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 159-60 (1973) (local rule providing for six person juries does not violate seventh amendment jury trial right, with no view expressed "as to whether any number less than six would suffice").

90. Consider recent efforts at altering the law regarding grand jury power to subpoena attorneys; a petition for a rule change was filed with the Illinois Supreme Court only after a bill (requiring that subpoenas receive prior judicial approval) was passed by the General Assembly but vetoed by the Governor. Golden, *ISBA Gets Support From ABA on Attorney Subpoena Issue*, 134 Chi. Daily L. Bull., Mar. 8, 1988, at 1, col. 2; Schweit, *Daley Opposes ISBA Plan to Limit Lawyer Subpoenas*, 134 Chi. Daily L. Bull., Mar. 24, 1988, at 1, col. 2.

very significant General Assembly duties regarding court structure,<sup>91</sup> it has not stopped exercising those powers itself in significant ways. As well, while the 1977 Illinois Supreme Court decision in *People v. Jackson* may have signaled “a new era of Illinois Supreme Court involvement in the process of developing rules of procedure and [for] the conduct of trials,”<sup>92</sup> the court has yet to move in fact toward establishing “a comprehensive and unified system of regulation of procedure and the trial of cases in Illinois.”<sup>93</sup> Illinois is thus left with “an unnecessarily complex, disorganized, and frequently unclear, if not inconsistent, morass of statutes, rules and judicial decisions” on procedural law.<sup>94</sup> The General Assembly’s recent passage of a general statute on attorney certification of claims and defenses, modeled on Federal Rule of Civil Procedure 11,<sup>95</sup> illustrates well the legislature’s unfortunate continuing involvement in procedural law, as well as the continuing inertia of the high court.<sup>96</sup>

Constitutional change is the best way, and perhaps the only way, to remedy existing problems in the distribution and exercise of pro-

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91. A part of the Code of Civil Procedure states:

(a) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to, but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in small claims actions, including service of process in connection therewith. . . .

(b) Subject to the rules of the Supreme Court, the circuit and Appellate Courts may make rules regulating their dockets, calendars, and business.

ILL. REV. STAT. ch. 110, para. 1-104 (1985). This delegation was added to the Civil Practice Act of 1933, a time when the General Assembly had greater constitutionally-defined responsibilities for organizing the Illinois judicial system. See *supra* text accompanying notes 29-30.

92. Graham, *supra* note 42, at 107.

93. *Id.* at 109. In the absence of constitutional amendments expressly recognizing primary judicial authority over all procedural law, this lack of movement may be wise—though such a movement may be supported by case law and by statute. See *supra* note 91. See also, e.g., Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1475 (1987) (urging that in the area of individual rights, the procedurally arduous means of constitutional change rather than extratextual procedures (case development) are preferable because they represent an accepted norm, foster societal consensus on basic values, promote constitutional stability and limit majoritarianism).

94. Graham, *supra* note 42, at 108.

95. See *supra* note 84 and accompanying text.

96. See *supra* note 85 and accompanying text.



cedural law-making powers. Needed are constitutional amendments which more clearly define the primary and secondary authority over Illinois procedural law and which delegate all primary authority to the judiciary. As well, amendments are needed which better assure open and accessible judicial rulemaking.

#### A. ABSOLUTE, PRIMARY AND SECONDARY AUTHORITY OVER PROCEDURAL LAW

In addressing the problems in the distribution of authority over procedural law, constitutional drafters should maintain, where feasible, well-developed and well-understood precedents. A continuing ability of the courts to recognize pockets of absolute judicial authority seems warranted; thus, certain areas of procedural law should be free of any legislative oversight. Yet, such areas should be small. Some absolute authority seems necessary for certain "general administrative and supervisory" guidelines, as well as for certain guidelines covering the regulation of the legal profession (including rules for attorney admission and discipline). Generally, pockets of absolute judicial authority should include matters "so fundamental and so necessary to a court" that their absence would render the phrase "judicial power" meaningless.<sup>97</sup>

Most procedural law guidelines would be subject only to a primary, non-absolute judicial authority. The exercise of such authority should vary, however, depending upon the guidelines under consideration. Judicial rules concerning the establishment of administrative, supervisory or professional conduct guidelines should always prevail over inconsistent statutes and should not otherwise be subject to override by the legislature. All statutes establishing administrative, supervisory or professional conduct guidelines need not be precluded. Rather, judicial rulemakers should defer to the General Assembly in these areas when judicial rules are lacking but are needed, or when augmentation of existing judicial rules seems necessary. This legislative power to fill gaps and to augment should be rarely exercised, and it

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97. Levin & Amsterdam, *supra* note 41, at 30. See also *U.S. v. Brainer*, 691 F.2d 691, 697 (4th Cir. 1982); *In re Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984); *In re Hearing on Immunity for Ethics Complaints*, 96 N.J. 669, 477 A.2d 339 (1984); *Eash v. Riggins Trucking Co.*, 757 F.2d 557, 562 n.7 (3d Cir. 1985). Distinctions involving the pockets of absolute judicial authority seemingly necessitate "nice distinctions that may be troublesome," but which are "nonetheless necessary." *Daniels v. Williams*, 474 U.S. 327, 334 (1986).

should require a supermajority vote in each house.<sup>98</sup> Such a legislative power should usually only be employed when the General Assembly pursues a substantive law goal in ways which significantly touch upon the implementation of judicial rules. The aforescribed statute on the certification of medical malpractice claims may exemplify such legislative power, as the legislature sought to reduce the numbers of certain substantive law claims and yet acted in an area, the regulation of attorney conduct during litigation, which the judiciary has placed within its exclusive domain. As will soon be demonstrated, the creation of open and accessible judicial rulemaking mechanisms should provide General Assembly members with ample opportunity for input during most judicial deliberations on administrative, supervisory, or professional conduct rules. It also should provide judicial rulemakers with a channel by which to communicate with the legislature about pending bills having procedural law ramifications.

Judicial authority over other areas of procedure (including matters often characterized as rules of practice and procedure) should be subject to a differing form of primary judicial authority. In these areas, the judiciary would initiate discussion of, and promulgate, almost all procedural law guidelines. However, this authority would be subject to greater legislative review. The judiciary would not possess the "final say." Rather, prior to their effectiveness, judicial rules in these areas would have to be submitted to the General Assembly, which could block implementation by a supermajority vote in each house.<sup>99</sup> Subsequent to implementation, the General Assembly could repeal, supplement or augment such judicial rules by a similar vote.<sup>100</sup> Of course, such secondary authority over procedural law is in addition to the participatory rights afforded legislators during open judicial rulemaking deliberations.

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98. Compare Levin & Amsterdam, *supra* note 41, at 39-40 (suggesting a two-thirds vote of the legislators in each house) and FLA. CONST. art. V, § 2 (two-thirds vote of each house can repeal a rule) with Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447 (1985) (inadvisable to limit legislative review of judicial rules).

99. The requirement of presentment to the governor seemingly holds even where the legislature is only blocking implementation of a judicial rule. *INS v. Chadha*, 462 U.S. 919 (1983) (unconstitutionality of a one-house legislative veto); see also *General Assembly of New Jersey v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982). Though a two-thirds or three-fifths vote by each house is sufficient to overcome gubernatorial veto, ILL. CONST. art. IV, § 9, arguably presentment of such a supermajority vote to the governor would still be necessary in order to assure executive branch participation in lawmaking.

100. See Levin & Amsterdam, *supra* note 41, at 40 n.185.



The legislature's authority over procedural law guidelines under such a scheme would thus always be secondary.<sup>101</sup> Such secondary authority would be somewhat stronger in the areas outside of administration, supervision and professional conduct regulation. Yet, in all settings, most procedural law guidelines would not require affirmative General Assembly action.

Prior to any consideration of how such primary judicial authority ought to be exercised, and thus of the merits of public process judicial rulemaking, a final question lingers: should the judiciary's primary authority over procedural law always be assumed by courts? While formal judicial rulemaking by groups of judges who do not form a single court has been relatively unknown in Illinois, there are precedents elsewhere. In California, for example, a council of judges (who serve on a variety of appellate and trial courts) is constitutionally responsible for adopting "rules for court administration, practice and procedure, not inconsistent with statute."<sup>102</sup> Comparably, some are now urging<sup>103</sup> that the rulemaking powers of the United States Supreme Court be transferred to the Judicial Conference of the United States<sup>104</sup> (where many feel they already lie *de facto*). Such non-court judicial rulemaking has much to commend it. For example, groups of judges from various courts will likely reflect diverse backgrounds and significant expertise in all levels of procedural law. As well, unlike the United States Supreme Court as rulemaker, a non-court judicial rulemaker would never later sit in a case challenging one of its own rules.<sup>105</sup> This is not to suggest that the absence of the high court as

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101. Secondary authority is justifiable as procedural laws both "may have radical impact on the community" and possess "the potential of frustrating substantive policies." Levin & Amsterdam, *supra* note 41, at 18. See also Kaplan & Greene, *The Legislature's Relation to Judicial Rule - Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 235, 254 (1951) ("it seems doubtful wisdom for a court to place itself beyond legislative control when it pronounces general rules"). But see Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 43-46 (1952) (urging there be no legislative authority).

102. CAL. CONST. art. VI, § 6. For a description of the California Judicial Council, see Kuzins, *Ordering the Courts*, 6 CAL. LAW 43 (1986). See also N.J. JUD. LAW § 214 (1937) (judicial conference); OR. REV. STAT. § 1.730 (1985) (Council on Court Procedures).

103. See Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1568 n.295 (1987).

104. 28 U.S.C. § 331 (1987) (currently, the Judicial Conference recommends to the U.S. Supreme Court changes to Supreme Court Rules governing lower federal courts).

105. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM.

final rulemaker is without cost. For example, its absence might undermine the efforts at achieving a unified court system—a goal of Illinois constitutional reforms in the past decades.<sup>106</sup> Perhaps, while not acting as final rulemaker, the supreme court might maintain a power to review and reject judicially-promulgated rules of others before they take effect.<sup>107</sup> While further investigation and debate seems warranted, delegation of primary authority to non-court judicial rule-makers may be preferable.

Regardless of which judicial rulemaker must give the final stamp of approval, groups of judges from different Illinois courts should be chiefly responsible for drafting, debating, and proposing most judicial rules. In this state and elsewhere, a high court with final rulemaking authority inevitably delegates most of its power to advisory committees consisting of lower court judges (as well as lawyers and others). Though such delegation is common, the processes utilized by these judicial rulemakers are subject to much variation. The history in Illinois reveals processes which are too often closed and secretive.<sup>108</sup> Constitutional amendments regarding primary judicial authority for procedural law must be accompanied by amendments more descriptive of the judicial rulemaking processes so that open and accessible judicial rulemaking is better assured.

#### B. PUBLIC PROCESS JUDICIAL RULEMAKING

Because the processes for judicial rulemaking in Illinois are frequently closed and secretive, often little is known of the participants

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L. REV. 905, 935 (1976) ("The argument that the Court remains completely free in fact to reconsider judicially the rules it has adopted legislatively is not supported by the history of judicial review of rules."). For additional references, see Lewis, *supra* note 103, at 1565 n.274.

106. See, e.g., *People v. Jackson*, 69 Ill. 2d 252, 256, 371 N.E.2d 602, 604 (1977) (constitutional recognition of the supreme court's supervisory authority over all courts "was employed to fortify the concept of a centrally supervised court system").

107. See, e.g., COL. REV. STAT. § 7, Rule 121(a) (1987) (local court rules submitted to Supreme Court take effect 45 days later unless rejected in writing). This rule has recently been changed. See 16 Colo. Law. 2209-10 (1987) (amendment to Rule 121(a) requiring written approval by high court of any new local rule). See also *Frazier v. Heebe*, 107 S. Ct. 2607, 2612 n.7 (1987) (supervisory power of high court to intervene and void local court rules) and FED. R. CIV. P. 83 (circuit judicial council may abrogate local rule).

108. See Burleigh, *Court Rules Made to be Amended, Deleted*, Chi. Daily L. Bull., Jan. 9, 1985, at 2, col. 2, where it is said: "Supreme Court rules govern everything . . . Yet the method by which these rules are amended, addended to or deleted does not satisfy many attorneys, who say they are often surprised by rule changes made without their input, through channels unknown."



(especially those who advise the final judicial rulemaker, as well as those who advise those advisors). Little is also usually known of judicial rulemaking deliberations. This is particularly troublesome when judicial rules affect sensitive issues of social policy rather than addressing merely technical issues.<sup>109</sup> A more open and accessible system may even be mandated under the emerging first amendment right of access.<sup>110</sup> It surely is compelled by democratic principles; such principles require that widespread and informed debate usually precede legislative or quasi-legislative action. As well, an open system serves such pragmatic goals as enhancing the quality of the final product and promoting the acceptance of rules by those subject to their dictates.<sup>111</sup>

Several general characteristics of open and accessible, and thus public process, judicial rulemaking can be identified. They include a relatively permanent and known rulemaking process: the assurance of adequate notice and opportunity to be heard prior to rule promulgation; a requirement that a reasoned basis for decision accompany new rules; and the opportunity for public initiative.<sup>112</sup> These attributes will vary somewhat in implementation, depending upon such factors as the judicial rulemaker (a court, or a group of judges, lawyers and others); the judicial rule under consideration (a narrow, technical rule, or a rule affecting sensitive policy issues); and the degree of autonomy possessed by the judicial rulemaker (absolute authority or one of two forms of primary authority).<sup>113</sup>

It seems unnecessary, and unwise, for the judicial rulemaking processes to be described in great detail within the constitution. Clear constitutional recognition of primary judicial authority over all procedural rules should prompt judicial rulemakers to adopt public process attributes, because the legislative character of their work and the later minimal involvement of the General Assembly would be

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109. Parness, *Public Process and State-Court Rulemaking*, 88 YALE L.J. 1319, 1322 (1979).

110. See *WJW-TV Inc. v. Cleveland*, Civil Action No. C87-1524 (N.D. Ohio March 30, 1988) described in *Public Access to Meetings Ruled a Right*, Nat'l L.J., April 18, 1988 at 20, col. 1 (recognizing first amendment access right to meetings of legislative bodies, including a city council). See also Parness & Copeland, *Access to Judicial Rulemaking Procedures*, 1982 ARIZ. ST. L.J. 641 (1982) (urging first amendment access right covers judicial rulemaking proceedings).

111. Parness & Manthey, *Public Process and State Judicial Rulemaking*, 1 PACE L. REV. 121, 130-32 (1980) (reviewing rationales for increased public process).

112. *Id.* at 132-44 (reviewing in detail techniques for implementing these characteristics into judicial rulemaking mechanisms).

113. Parness, *supra* note 109, at 1322-24.

clear. Implementation of public process judicial rulemaking in Illinois will be facilitated by the recent reforms in other states.<sup>114</sup> One practice which must soon be terminated involves the use of *ad hoc* committees to advise judicial rulemakers.<sup>115</sup> The structure and duties of these advisory bodies is unclear. Preferable are permanent advisory bodies, whose roles are defined within court rule or elsewhere and whose membership assures expertise, as well as representation of diverse elements within and outside the legal profession.

Whether judicial rulemaking is undertaken by a court or others, and whether absolute or non-absolute primary authority is involved, public process judicial rulemaking should provide significant opportunity for dialogue between judges and legislators prior to any rule promulgation. Judicial rules inevitably have some impact on the laws within the legislature's domain. Thus, where relevant, the substance/procedure dichotomy, as well as the division between absolute and non-absolute judicial authority, could be discussed before clashes develop. Such dialogue should not conflict with principles of separation of powers. Input by legislators during the consideration of judicially-promulgated rules, in fact, promotes democratic values; it is easily distinguished from instances of interference by legislators with judicial consideration of cases, or of interference by judges with legislative consideration of a bill.

Finally, whether the Illinois Judicial Conference or (preferably) a smaller and more representative body<sup>116</sup> continues to serve as advisor to the high court as rulemaker or is itself delegated some final rule-making authority, the structure and functions of major judicial rule-making bodies should be addressed constitutionally. One important function involves insuring the necessary dialogue between the legisla-

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114. A compilation of recent reforms appears in Parness & Freeman, *The Process of Factfinding in Judicial Rulemaking: "Some Kind of Hearing" on the Factual Premises Underlying Judicial Rules*, 5 PACE L. REV. 1, 3-4 n.3 (1984).

115. Unlike the Federal Judicial Conference which has established, pursuant to 28 U.S.C. § 331 (1987), several permanent and widely-known standing committees to advise it on rule changes (where those committees, in fact, undertake most of the rule-making initiative, Weinstein, *supra* note 99, at 908-09), the Illinois Judicial Conference apparently has no comparable committees, though its Executive Committee at least has the power to recommend their appointment. ILL. REV. STAT. ch. 110A, § 41(c)(4) (1985).

116. As contrasted with the Federal Judicial Conference or state judicial conferences or councils having rulemaking responsibilities (if only advisory), *see supra* notes 102 & 104 and accompanying text, the Illinois Judicial Conference is quite large. ILL. REV. STAT. ch. 110A, para. 41 (1985). In addition, the Illinois Judicial Conference is composed only of judges. *Id.*



ture and any judicial rulemaker.<sup>117</sup> Another is the undertaking of research (typically through a contractor) on the Illinois judicial system where such research is outside the province (though with the aid) of the Administrative Office of the Illinois courts. Federal Judicial Center<sup>118</sup> activities provide a useful model, as does the work of the Administrative Conference of the United States.<sup>119</sup>

### III. CONCLUSION

The present distribution and exercise of responsibility for Illinois procedural law governing courts and the legal profession are troublesome. The division of responsibility between the legislature and the judiciary too often is unclear and overly deferential to the legislature. Because primary authority for procedural law is shared by the legislature and the judiciary, unfortunate clashes often develop between statutes and rules. As well, when debating and establishing procedural law, the General Assembly often fails to include judges and lawyers in the dialogue in any significant way.

Primary judicial authority over all procedural law must now be recognized. Such recognition is supported by both constitutional history and strong public policy rationales. In exercising responsibility for procedural law, however, the judiciary must not employ a closed and secretive process. Public process judicial rulemaking should be required.

Remedies should come via constitutional amendment. The current hodgepodge of constitutional provisions on procedural lawmaking should be replaced by a small set of directives which more clearly delegate and define primary and secondary authority. These directives should permit (though not address) some absolute judicial authority, and should expressly delegate all primary authority to the judiciary. Only secondary authority should be vested in the legislature. Differences in the forms of primary and secondary authority should be made clear. Non-court judicial rulemakers should be expressly rec-

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117. Rehnquist, *Chief Justice Outlines Court's Changes, Needs*, " 134 Chi. Daily L. Bull., Jan. 4, 1988, at 2, col. 1 (reporting on the Federal Judicial Conference's establishment of a legislative liaison group to assist in monitoring legislation and to seek to insure Conference views are made known to Congress in a timely and effective manner).

118. 28 U.S.C. § 620(b)(1) (1985) (the Center is responsible for conducting research as well as for stimulating and coordinating the research of others).

119. 5 U.S.C. §§ 571, 574 (1985) (the Conference, assisted by outside experts, is responsible for research and proposals regarding federal administrative agency reform).

ognized, even if their role is only advisory. Finally, constitutional provisions should promote the use of open and accessible decision-making processes during judicial rulemaking.



# The 1970 Illinois Constitution: The First Two Decades\*

A Selected Bibliography  
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Spring 1988

## TABLE OF CONTENTS

	<u>Page</u>
Prefatory Note .....	846
Sixth Illinois Constitutional Convention.....	847
Preamble & Article I—Bill of Rights.....	852
Article II—The Powers of the State.....	859
Article III—Suffrage and Elections.....	860
Article IV—The Legislature.....	862
Article V—The Executive.....	867
Article VI—The Judiciary .....	870
Article VII—Local Government .....	876
Article VIII—Finance.....	889
Article IX—Revenue .....	891
Article X—Education.....	896
Article XI—Environment .....	898
Article XII—The Militia .....	898
Article XIII—General Provisions.....	898
Article XIV—Constitutional Revisions.....	901
Miscellaneous .....	903
Transition Schedule .....	904

## PREFATORY NOTE

The bibliography is divided into seventeen topics. They are, in order, the Sixth Illinois Constitutional Convention (which extends from the call in 1968 through the adoption in 1970); Preamble and Articles One through Fourteen of the constitution, *seriatim*; Miscellaneous (which lists commentaries on more than one article or all of the constitution); and the Transition Schedule. We have divided the commentaries on each topic into two parts. First come the articles and books, as well as a few selected reports, on each topic. Then we list the opinions issued by the Attorney General of Illinois advising officials about the topic. For analyses on the effect of these opinions, see "Effect of Attorney General's Opinions," Illinois Legislative Council File 8-252 (April 7, 1973), a memo written by Gerald L. Gherardini of the Illinois Legislative Council, and "The Role of Attorney General's Opinions in Illinois," by Attorney General William J. Scott, 67 Northwestern Law Review 643 (1972). For an analysis of the role of Attorney General's opinions on the 1970 Illinois Constitution, see "Attorney General's opinions: Take 'em or Leave 'em—at your peril," by Ann Lousin, 2 Illinois Issues 20 (No. 4 April, 1976).

We advise anyone using this bibliography to begin by searching for the topic being researched, using the section numbers in the left column as a guide to specific sections of an article, e.g., Article 4, Section 9. We advise reading books and articles first, then attorney general's opinions. If further research is necessary, please look at the list of commentaries on the 1969-1970 convention for useful histories of the sections or topics and at "miscellaneous" for more general commentaries on the constitution. Whenever an entry deals with more than one topic, the entry appears under each appropriate topic. We have terminated the list with entries available in the spring of 1988. Finally, we have endeavored to include every possible secondary source, even some not generally available, but we are aware that no bibliography can be anything but "selected" or incomplete. We are grateful to The John Marshall Law School Library for its permission to use those portions of this bibliography that appeared in their publication series in 1983 (The John Marshall Law School Publication Series Number 2.)

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S-52	8-6-69	Servicemen/Absentee Ballots for Con Con
S-61	9-5-69	County Board Member/Con Con Delegate
S-108	12-16-69	Election of Con Con Officers
S-153	4-13-70	Post-convention Payment of Con Con Officials
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19	S-435	3-24-72	Hiring handicapped over insurance carrier's objections
18	S-490	6-30-72	18 year old male marriages
18	S-491	7-17-72	16 year old male marriages



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| 16 | S-509   | 8-31-72  | State Employees Retirement System Eligibility for Increased Benefits    |
| 6  | NP-595  | 5-30-73  | Motor Vehicles: Sale of Vehicle Registration Records (Right to Privacy) |
| 4  | -645    | 10-30-73 | Juvenile Proceedings and News Publications                              |
| 2  | S-671   | 2-13-73  | Age for Liquor Employment   |
| 18 | S-695   | 2-13-74  | Voter Registration of Married Women                                     |
| 18 | S-711   | 2-25-74  | Motor Vehicle Registration of Married Women                             |
| 18 | NP-749  | 4-19-74  | Women's right to work in mines  |
| 19 | NP-755  | 5-9-74   | Handicapped Act   |
| 17 | NP-790  | 7-18-74  | County Fair Housing Ordinance   |
| 2  | NP-8481 | 2-18-74  | Classifying miners by minerals extracted                                |
| 18 | S-979   | 10-23-75 | Widower's right to accidental death benefits                            |
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Sec.	Number	Date	Topic
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1	S-381	12-28-71	18 year olds as Jurors
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4	S-1078	4-23-76	Status of Precinct Registrars
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5	S-310	6-16-71	Continuous Session of 77th General Assembly
9	S-357	10-11-71	Amendatory Veto
10	S-553	3-23-72	Effective Date of Legislation
9	S-438	4-12-72	Amendatory Veto (Follow up S-357)
13	S-453	5-3-72	Special Legislation and Home Rule Amendment
7	S-458	5-30-72	Transcript of Legislative Debates
7	S-459	5-30-72	Shortening Legislative Journals
7	S-461	5-30-72	Electronic Recording of Legislative Debates
8	S-509	8-31-72	State Employees Retirement System Eligibility for Increased Benefits
8	Op Re		
	HB 1954	9-6-72	Germaneness and Three Readings Rule
10	Op Re		
	HB 3743	9-7-72	Effective Date of Laws after <i>Klinger</i>
10	S-540	1-13-72	Effective Date of Laws
5	S-548	12-27-72	Special Sessions
10	S-600	6-26-73	Effective date of Legislation: Appropriations
10	NP-629	9-14-73	Effective Date: SB 668
9	S-630	10-11-73	Altering Condition of Appropriation
9	S-631	10-16-73	Spending Unreduced Amount
13	S-633	10-16-73	Leaf Burning & Special Legislation



10	S-658	11-15-73	Fees and Salaries of County Officers
10	S-725	3-21-74	Effective Date: Death Penalty Bill
1	S-727	3-22-74	Parole & Pardon Board
9	S-783	7-18-74	Time Periods on Vetoes
6	S-791	7-18-74	Reconsideration of Confirmation
8	P-792	7-18-74	Appropriations and Transfers
13	NP-848	12-18-74	Classification of Mines by Minerals Ex- tracted
9 & 10	S-890	4-10-75	Effective Date and Veto Override
9	S-936	7-24-75	Item Veto Power and Striking Language
8	S-939	7-30-75	Illinois Purchasing Act & Germaneness
10	S-961	9-10-75	Effective Date
2	S-1027	1-5-76	Legislator as County Board Member
9	S-1097	5-27-76	Appropriations: Substantive Matter
9	S-1148	9-7-76	Vetoed Bills in Special Session
11	S-1223	4-7-77	Travel Expenses in One Week
7	NP-1325	12-28-77	Open Legislative Comm'n Meetings
8	S-1349	3-30-78	Appropriations: Substantive Matter
11	S-1365	6-29-78	Automatic Legislative Pay Raise
10	S-1413	3-9-79	Retroactive Effective Date of Statute
2	80-027	9-4-80	Compatibility of State Representative and Township Supervisor

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17	NP-302	6-10-71	Effective Date of Comptroller
5	S-531	11-6-72	Declaration of Elected Executive Officers
9	S-550	2-28-73	Governor's Appointees & Ethics Statements

9	S-598	6-1-73	Governor's Power to Appoint Acting Director of Code Departments
17	NP-662	9-6-73	Cemeteries: Assets in Care Fund
17	S-628	9-10-73	State Employees Compensation: Withholding Warrant
12	S-727	3-22-74	Parole & Pardon Board
17 & 18	S-728	3-27-74	Comptroller-Treasurer: Imprest Funds
9	S-771	6-18-74	Appointing Before Effective Date
9	S-791	7-18-84	Reconsideration of Confirmation
17	NP-792	7-18-74	Appropriations & Transfers
15	S-840	11-27-74	Attorney General and "Ill. Soybean Board"
9	S-846	12-10-74	Vacancy in Superintendent of State Fair
17	NP-855	1-17-75	Comptroller and Teacher's Retirement
17 & 18	S-918	6-20-75	Ill. Building Authority Imprest Funds: Comptroller & Treasurer
21	S-1017	12-12-75	Increase in State Police Board Per Diem
18 & 20	S-1131	7-26-76	Bonding Requirement of State Treasurer
20	S-1194	1-7-77	State Officers: Blanket Bonds
8	S-1295	9-30-77	Executive Order & Retirement System
9	S-1374	8-1-78	Legislative Commission's Control Over Funds Already Appropriated
17	81-024	7-28-81	Comptroller & Authority of a Department to Create an Entity Outside Department
17,18	82-001	1-26-82	Payment of Legal Services by Speaker of House in Reapportionment
12	82-043	11-18-82	Open Meetings Act, Executive Clemency & Prisoner Review Board
15	88-001	3-21-88	Appointment of Persons To Assistant Attorney General Positions Funded by Department of Revenue

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15	S-392	1-7-72	Appropriation for Judicial Inquiry Board
19	S-565	3-28-72	State's Attorney Advisor to County Board
12	S-454	5-11-72	Judicial Nominations
12	Op Re		
	HB 4302	8-1-72	Judicial Nominations
14	NP-507	8-7-72	Salaries of Court of Claims Judges
12	S-526	11-1-72	Retention of Judges
15	S-587	5-22-73	Judicial Inquiry Board: Authority to Devise Travel Regulations
18	S-639	10-26-73	State Officers: Circuit Clerk
14,18	S-678	1-24-74	Fees and Salaries: Clerk of Circuit Court
18	S-730	4-2-74	Secretaries of Circuit Court



14,18	NP-744	4-17-74	Circuit Court Clerk: Deposit Funds
14,18	NP-746	4-18-74	Circuit Court Clerk's Fees
19	NP-813	10-15-74	State's Attorneys and Regional Planning Commission
19	S-814	10-15-74	State's Attorneys and County Officers
19	S-863	2-4-75	State's Attorney Advisor to County Board
18	S-864	2-4-75	Salary of Circuit Court Clerk
18	S-879	4-9-75	Qualifications of Deputy Circuit Clerk
19	S-881	4-9-75	State's Attorney's Fees
19	S-919	6-20-75	State's Attorneys - County Election Contests
18	NP-945	8-8-75	Clerk's of Circuit Court Responsibilities
19	S-995	11-5-75	State's Attorney - Lease of County Property for Private Purpose
12	S-1022	12-23-75	Vacancies in Circuit Judge's Office Caused by Mandatory Retirement
14,18	P-1208	1-26-77	Fees of Circuit Court Clerk
19	S-1217	3-24-77	State's Attorney & Municipal Prosecutions
19	S-1237	5-25-77	State's Attorney & County Merit Commission
19	S-1246	5-26-77	State's Attorney & Road District
19	S-1254	6-10-77	State's Attorney & Village
14,18	S-1269	7-25-77	Circuit Court Clerk's Fees from Municipality
14,18	S-1292	8-18-77	Circuit Court Clerk's Fees & Deposits
19	S-1411	3-9-79	Compatibility of Assistant State's Attorney & City Commissioner
7	S-1426	4-30-79	Holidays for County Officers
19	S-1429	4-30-79	School Boards & State's Attorneys
18	S-1499	7-9-80	Employment of Deputies in Office of Circuit Clerk
19	83-001	2-17-83	State's Attorney's Duties and Fees of Attorneys Privately Retained by County Officers
11,12	85-025	12-9-85	Impact of Dividing a Judicial Circuit
19	86-006	9-18-86	Conflict Between Representing County Clerk and the People

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#### OPINIONS OF THE ATTORNEY GENERAL

<i>File</i>			
<i>Sec.</i>	<i>Number</i>	<i>Date</i>	<i>Topic</i>
4	S-275	3-1-71	Coroner-Implementing Legislation
9	NP-336	9-24-71	Extension Fee
9,10	S-347	9-24-71	County Extension Fee
9	S-367	9-24-71	Extension Fee
4	NP-354	10-7-71	Coroner's Salaries
9	NP-355	10-7-71	Coroner's Fees
3	S-359	10-27-71	Selection of County Board Candidate
4	NP-376	12-17-71	Altering Sheriff's Duties
3	NP-388	1-6-72	Counties: Reapportionment
10	S-391	1-6-72	Law Enforcements Agreements
9	S-399	2-3-72	Changes in Compensation of County Officers
9	S-418	3-13-72	Fees for Township and Road District Officer
9	S-468	6-23-72	Transition & County Officers' Salaries
9	S-477	6-23-72	Changes in Compensation of County Board
9	S-486	6-23-72	Changes in Compensation of County Board
4	S-508	8-23-72	Elimination of County Coroner's Office
9	S-554	3-23-72	County Board Salaries
9	S-555	3-23-72	County Extension Fee
4	S-557	3-23-73	Transition Schedule - Sheriff
9	S-569	3-28-73	County Officers Salaries
9	S-570	3-28-73	County Officers Fees
1,8	S-601	6-27-73	Public Health Districts Status
1,8	S-602	6-27-73	County & Multi-County Health Depts. Status
4	NP-609	8-20-73	Counties: County Board Member as County Hospital Board Member

1,8	S-615	9-6-73	County Health Depts. - Special Districts
4	S-624	9-6-73	County Treasurer Successive Terms
8	S-627	9-7-73	Special Districts & Ethics Act
10	NP-637	10-17-73	Intergovernmental Cooperation
5	NP-640	10-26-73	Consolidation of Townships
5	NP-641	10-26-73	Alteration of Township Boundaries
8	S-644	10-30-73	Forest Preserve Districts
	NP-650	10-31-73	Appointment of Board of Review
9	S-658	11-15-73	Fees and Salaries of County Officers
6	S-663	11-15-73	Lowered Drinking Age
4	S-664	11-15-73	County Jail Seat
5	S-665	11-15-73	Salary of Township Road Commissioners
5	NP-675	1-7-74	Counties: Consolidation of Townships
9	S-678	1-24-74	Fees: Clerk of Circuit Court
3	S-680	1-24-74	County Board: Change in Composition
10	S-684	1-30-74	Police Services: Intergovernmental Cooperation
7	NP-691	1-30-74	Counties: Disposition of Excess Land
7	NP-692	1-31-74	County Grants to Private Organizations
10	S-696	2-13-74	Intergovernmental Cooperation
1	NP-700	2-14-74	Housing Authorities: Political Subdivisions
4	NP-710	2-25-74	Deputy Sheriff as Investigator for Public Defender
9	S-777	6-18-74	Changes in Salary of Officials
7	NP-790	7-18-74	County Fair Housing Ordinance
4	S-794	8-13-74	County Treasurer & Forest Preserve Dist.
11	S-806	9-4-74	Referenda: Constitutional Requirements
4,9	S-826	10-31-74	Sheriff's Jail Fee
9	NP-828	10-31-74	County Officers' Graduated Salaries
9	NP-854	12-18-74	County Coroner Salary Increased
9	S-857	1-17-75	County Board Compensation Changes
9	S-861	1-20-75	County Officials' Salary Changes
19	S-863	2-4-75	State's Attorney - Advisor to County Board
18	S-864	2-4-75	Salary of Circuit Court Clerk
4	S-865	2-4-75	Sheriff Vacancy - Coroner
3	S-877	3-17-75	Conflict of Interest: County Board, etc.
1,8	S-885	4-9-75	County & Hospital District
11	S-886	4-9-75	Referendum for Discontinuation of County TB District



19	S-919	6-20-75	State's Attorney - County Election Contests
6,10	S-940	8-1-75	Crosstown Expressway - Home Rule
6,7	S-951	8-28-75	Special Service Area Taxation
6	S-952	8-28-75	Home Rule & Housing Authority
4	S-957	8-28-75	Sheriff's Officers
4	S-961	9-10-75	Vacancies in County Offices
5	NP-962	9-24-75	Township Auditor & Supervisor
9	S-963	9-24-75	Meaning of "Fee"
4	NP-973	9-24-75	Vacancy in Office of County Clerk
4	NP-1003	12-1-75	County Board - Recorder
9	S-1006	12-5-75	County Board Salaries & Cost of Living
10	S-1029	1-7-76	Intergovernmental Corporation
3	S-1062	3-17-76	County Board Member Selection: Cook & Others
4,9	S-1066	3-18-76	Compensation of County Officers
9	S-1089	5-13-76	Extension on Drainage Districts
10	S-1102	5-28-76	Intergovernmental Cooperation: City-County
11	S-1105	6-11-76	Public Policy Questions
4	S-1120	7-1-76	County Superintendent of Highways & Aldermen
5	S-1122	7-9-76	Increase in Township Supervisor Salary
4	S-1126	7-16-76	Creation of County Offices - Transfer of Duties
4	S-1127	7-15-76	Selection of Recorder of Deeds
9	S-1138	8-9-76	Fees for Incarcerating Other Government Prisoners
6,7	S-1144	8-19-76	Special Service Area: Public Hearings
6,7	S-1145	8-19-76	Special Service Area: Public Hearings
6	S-1146	8-19-76	Home Rule & Health Officer
4	S-1154	9-27-76	County Recorder & Trust Deeds
7	S-1155	9-27-76	County Power to Regulate Land Plats in Certain Municipalities
10	S-1161	9-27-76	Intergovernmental Cooperation: County Police Protection and Private Agencies
4	S-1180	11-22-76	Savings & Loans & County Deposits
7	S-1183	11-22-76	Funds/Service to Senior Citizens' Organizations

4,9	S-1185	11-22-76	Salaries of Sheriff & County Superintendent of Safety
4	S-1186	11-22-76	Savings & Loan Associations and County Deposits
9	S-1196	1-13-77	Fees Collected by Municipal Clerks
1,8	NP-1205	1-13-77	Definition of Special District
9	NP-1208	1-26-77	Fees of Circuit Court Clerk
10	S-1210	2-18-77	Tax Sales & Private Companies
7	S-1217	3-24-77	State's Attorney & Municipal Prosecutions
4	S-1222	3-24-77	Recorder's Saturday & Holiday Hours
4,7	S-1233	4-29-77	Compromising Taxes
6	S-1238	5-25-77	Chicago's Methadone Clinics & Preemption by 6(h)
9	S-1249	6-9-77	Post- <i>Bosworth</i> Return of Fees
9	S-1269	7-25-77	Circuit Court Clerk's Fees from Municipality
4	S-1279	7-26-77	Coroner's Duties at Crime Scene
4	S-1282	7-26-77	Sheriff as Custodian of Courthouse
9	S-1292	8-18-77	Circuit Court Clerk's Fees & Deposits
4	S-1308	10-24-77	Sheriffs as "Policemen"
10	S-1311	10-31-77	RTA Taxes and Intergovernmental Cooperation
10	S-1324	12-20-77	County-City Airport
10	S-1327	1-6-78	Compatibility of County Board Member & Trustee of River Conservancy District
9	S-1336	2-2-78	County Clerk's Fees for Petitions
9	S-1340	3-15-78	County Tax to Cover Cost of Tax Collection
6	S-1344	3-15-78	Home Rule Unit's Participation in Pension Systems
10	S-1345	3-15-78	Rental of County Building to Health Dept.
4	S-1350	4-7-78	Duty of the Recorder of Deeds Under the Plat Act
1	S-1361	6-20-78	Municipal Police Pension Funds
4	S-1367	6-29-78	County Zoning Board of Appeals and Certain Other Offices
4	S-1368	6-29-78	Powers of Coroner
6	S-1389	9-22-78	Power to Give Sales Tax Revenue to County



- |             |         |         |  |
|-------------|---------|---------|--|
| 6,7         | S-1392  | 9-25-78 | Home Rule & Non-Home Rule Cities' Power to Use "Interim Financing" for Farmers Home Administration Projects                        |
| 10          | S-1411  | 3-9-79  | Compatibility of Assistant State's Attorney and City Commissioner  |
| 4           | S-1439  | 6-7-79  | County Treasurer's Funds   |
| 9           | S-1441  | 6-7-79  | Compensation of County Board Members Filling Unexpired Terms   |
| 10          | S-1485  | 4-14-80 | Power of County to Provide Contractual Police Services to a City or Village  |
| 6           | S-1491  | 5-12-80 | Exercise of Exclusive State Power by General Assembly  |
| 10          | S-1494  | 6-30-80 | Compatibility of Village Mayor and School Board Member   |
| 6           | S-1498  | 7-7-80  | Home Rule and Escheat of Property  |
| 8           | 81-009  | 4-23-81 | Assistant Regional Superintendent of Schools - Vacancy   |
| 1           | 81-012  | 5-8-81  | Local Library as a Unit of Local Government  |
| 11,12       | 81-035  | 12-3-81 | Dissolution of Fire Protection Districts   |
| 9           | 81-0431 | 2-22-81 | Fees for Domestic Violence Fund  |
| 7           | 82-002  | 2-18-82 | Non-Home Rule County & Mental Health Boards  |
| 1,6,<br>7,8 | 82-003  | 2-18-82 | Meaning of "Local General Purpose Unit of Government" in E.P.A.  |
| 7           | 82-007  | 4-20-82 | Power of a County Board to Indemnify a Regional Board of School Trustees   |
| 4,7         | 82-012  | 5-14-82 | Sheriffs in Non-Home Rule Counties & Police Protection   |
| 1           | 82-014  | 5-17-82 | County Does not Have to Pay Sheriff's Fee  |
| 1           | 82-018  | 6-28-82 | Counties Are Units of Local Government   |
| 6           | 82-027  | 8-20-82 | Validity of Municipal Ordinances Imposing Automobile Renting, Occupation and Use Taxes Prior to Effective Date of Enabling Statute |
|             | 82-028  | 9-7-82  | Meaning of "Qualified Electors", etc., in Referenda  |
| 7           | 82-031  | 9-13-82 | Non-home Rule County Board's Power to Abolish T.B. Sanitarium and Board  |

10	82-032	9-15-82	Municipal Police Services and Private Security Firm
7	82-037	11-09-82	Amenability of Drainage District to Non-Home Rule County Flood Plain Ordinance
4	82-039 (NP)	11-10-82	Compatibility of Offices of County Treasurer and Park District Commissioner
6	82-054	12-14-82	Application of Local Records Act to Home Rule Units
4	82-060	12-30-82	Conflict of Interest: County Board Member or Partner as Defense Counsel
7	83-005	3-11-83	Abolition of Municipal Home Rule Status
7	83-013	9-27-83	Non-Home Rule County's Power to Submit Advisory Questions
4	83-016	10-7-83	Sheriff's Custody of Courthouse
4	83-022	11-10-83	Sheriffs and County Taxes to Support Jails
8	84-016	9-13-84	School and School Districts: Joint Agreement Special Education Cooperatives
4	84-017	9-13-84	Manner of Selecting County Superintendent of Highways
7,11	85-017	8-2-85	Nonpartisan Elections in Non-Home Rule Municipalities - Referenda
10	85-010	7-18-85	Intergovernmental Cooperation Agreements: No New Power
10	85-015	7-19-85	Incompatible: Park District President & City Alderman
10	85-019	11-19-85	Compatibility of Offices of City Council & School Board Member
10	85-021	undated	Municipal Police Protection of School District Property
4	85-022	11-25-85	County Central Services Department: Board or Referendum?
10	86-005	6-4-86	Power of Non-Home Rule Municipalities to Create and Use a Bond Fund By "Intergovernmental Cooperation"
8	87-001	3-16-87	School Districts: Special Education Joint Agreement Cooperatives



## ARTICLE VIII - FINANCE

## BOOKS AND ARTICLES

*Section*

- 2 Bowman, Woods, "Fix the Flaws in the Fiscal System," 14 Ill. Issues 36 (Jan. 1988) (See Letter to the Editor at 14 Ill. Issues 11 (April 1988)).
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- 3 Grimaldi, Theresa M., "Judging the Auditor General: Cronson's 10-year term", 9 Ill. Issues 6 (Dec. 1983)
- 3 Gulley, Roy O. "Why the Illinois Attorney Registration and Disciplinary Commission Should not be Audited", 63 Chi. B. Rec. 78 (1980-81)
- 3 Heinecke, Burnell, "It Cost Illinois Millions to Learn the Need for an Independent Postaudit Agency," 2 Ill. Issues 22-23 (June 1976).
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#### OPINIONS OF THE ATTORNEY GENERAL

<i>File</i>			
<i>Sec.</i>	<i>Number</i>	<i>Date</i>	<i>Topic</i>
1	NP-460	5-30-72	School Building and Public Purpose
1	S-589	5-22-73	Racing Board Indemnification - Public Purpose
2	S-605	8-10-73	Appropriations: Fiscal Year Expended
1	NP-692	1-31-74	County Grants to Private Organizations
2	S-719	3-20-74	Double Appropriations
2	NP-762	5-24-74	Appropriations - Follow Purpose
2	S-807	9-20-74	Appropriations: Expenditures During Lapse Period
3	S-816	10-15-74	Auditor General - Conflicts
2	S-821	10-31-74	Expenditures of Federal Grant Funds
1,2	S-835	10-31-74	Mental Health Expenditures
1	NP-843	11-27-74	County Leases to Private Farms
1	NP-844	11-27-74	County Leases to NFP Day Care Center
1	NP-860	1-17-75	Lieutenant Governor's Petty Cash Fund
1	S-867	2-4-75	Copying of Public Records
1	S-941	8-8-75	Sale of County Property - Public Property
1	S-967	9-24-75	Counties: Assignment of Wages
2	S-977	10-16-75	Appropriations: State Fair Agency
1	S-995	11-5-75	State's Attorney - Lease of County Property for Private Purpose
1	NP-1001	11-26-75	Schools: Accumulated Sick Leave
1	S-1046	2-5-76	Leasing Public Space
1	S-1058	3-17-76	Leasing Space to Congressmen
1	S-1094	5-27-76	School Funds Used for Promotion



2	S-1134	7-26-76	Biennial Budget Prohibited
1	S-1183	11-22-76	Funds/Services to Senior Citizens' Organizations
1	S-1204	1-13-77	County Hospital Records Available
1	S-1233	4-29-77	Compromising Taxes
1	S-1265	7-17-77	Deferred Compensation & Public Funds
1	S-1288	8-18-77	Leasing Space to Private College
1	S-1323	12-15-77	Right to Computer Tape of Records
2	S-1349	3-30-78	Appropriations: Substantive Matter
1	S-1364	6-29-78	Public Records & Medicare
1	S-1369	6-29-78	"Public Service" Work of Probationers
1	S-1383	9-1-78	Disposal of State's Attorney Records
2	S-1391	9-22-78	Amendments to FY78 Appropriation Acts
1	S-1412	3-9-79	Leases as State Debt
1	S-1484	4-14-80	Confidentiality of Personnel Records of Public Officers & Employees
1	80-0431	2-12-80	Disclosure of Compensation Paid to County-Contracted Medical Specialists
1	80-020	6-24-81	Expenditures During Lapse Periods
2	82-001	1-26-82	Payment for Legal Services by Speaker of House in Reapportionment Appeal
3	82-022	7-20-82	Duty of Auditor General to Audit the Attorney Registration and Disciplinary Commission of the Supreme Court
1	82-029	9-9-82	Confidentiality of Petitions for Regional Superintendents of Schools
1	82-054	12-14-82	Application of Local Records Act to Home Rule Units
3	83-011	8-19-83	Disclosures of Confidential Information to Auditor General
2	85-008	7-18-85	Land Acquisition by Contract-Debt, Appropriation
1	85-009	7-18-85	Land Public Records Act: Chicago World's Fair -1992 Authority

## ARTICLE IX - REVENUE

### BOOKS AND ARTICLES

#### *Section*

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4,5	S-453	5-3-77	Mobile Home Tax
6	S-366	11-18-71	Church Exemption
5	S-610	8-27-73	Banks: Personal Property Taxation
5	S-649	10-31-73	Uniform Gifts to Minors: Personal Property Taxation
6	S-672	12-17-73	Taxation Exemption: Cemetery Property
5	NP-900	5-5-75	Taxation of Mobile Homes
4,6	S-971	9-24-75	Exemption for Nursing Home
6	S-1045	2-5-76	Homestead Exemption
2	S-1110	6-15-76	State Employees & State/Local Taxes
9	S-1209	2-18-77	Illinois Educational Consortium's Bonds
8	S-1210	2-18-77	Tax Sales Procedures Companies
4	S-1216	3-24-77	Assessed Valuation & Real Estate Taxes
8	S-1232	4-21-77	Tax Sales & Procedures
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9	S-1265	7-15-77	Deferred Compensation & State Debt
4	S-1274	7-25-77	Equalized Assessments
9	S-1412	3-9-79	Leases as State Debt
4	S-1464	11-2-79	Method of Assessing Real Property for Tax Purposes
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5	81-012	5-8-81	Local Library as a Unit of Local Government (Revenue Sharing)
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2	S-788	7-18-74	Board of Education Members
2	S-837	11-14-74	Board of Education Vote
1	S-889	4-9-75	Posting Trespass Notice

2	S-913	6-17-75	Board of Education Terms
2	S-915	6-20-75	Board of Education Appointment to Board of Higher Education
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2	S-515	10-17-72	Statement of Economic Interests Applicability to Employees
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2	S-615	9-6-73	Governor's Appointees & Ethics Statements
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1	Letter	11-17-75	Webber Borchers' Conviction Speaker Redmond
3	S-1063	3-17-76	Oath for Member of Non-Constitutional Boards
2	S-1077	4-21-76	Illinois Arts Council & Economic Interest Statements
5	S-1153	9-27-76	Universities' Retirement Credit
5	S-1330	1-19-78	Convicted Legislator's Pension
5	S-1407	1-10-79	Effect of Pension Code Revision on Vested Rights
8	S-1488	4-15-80	Trust Department May Not Establish Branch Office
7	85-011	7-18-85	Trust Companies May "Branch"
5	85-016	7-22-85	Pensions: Transfer of Creditable Service

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Sec.	Number	Date	Topic
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4	S-456	5-11-72	Ratification of Federal Amendments (Blair)
4	S-571	4-2-73	Ratification of Federal Amendments
2	S-1486	4-14-80	Requirement of Readings



- 1        87-007    9-17-87    Proper Year for Automatic Submission of  
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<i>File Number</i>	<i>Date</i>	<i>Topic</i>
82-027	8-20-82	Anticipatory Legislation - Home Rule Renting, Occupation and Use Taxes Ordinances

TRANSITION SCHEDULE

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8            “Cumulative voting rights for shareholders”, (analysis of *Roanoke Agency v. Edgar*) 10 Ill. Issues 40 (June 1984).

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<i>File Number</i>	<i>Date</i>	<i>Topic</i>
S-309	6-15-71	Veto Time Schedule
S-310	6-6-71	Continuous Session of the 77th General Assembly
Letter to Sec. of State	2-2-72	Removing Transition Scheduling from Copies of Constitution
S-468	6-23-72	Transition & County Officers’ Salaries
S-557	3-23-72	Transition Schedule - Sheriff
S-599	1-29-73	Reprinting Schedule Schedule
S-624	9-6-73	County Treasurer - Successive Terms





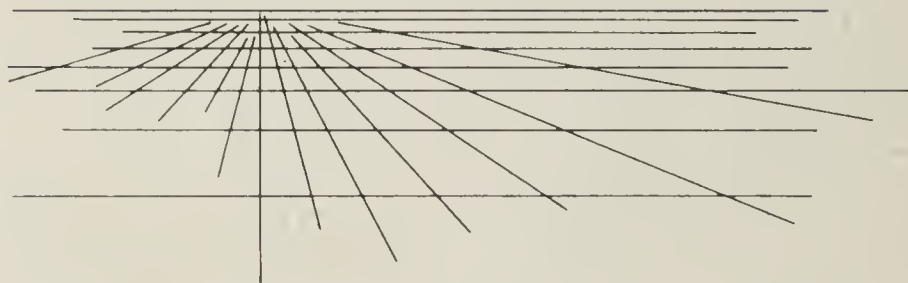








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